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IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 91-177

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Petitioner,

v.

RONALD WOODS,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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68 pp

INTRODUCTION

The petition for writ of certiorari filed by the Florida Attorney General in this case requests that this Court review and reverse the unanimous decision of the United States Court of Appeals for the Eleventh Circuit which found that the Respondent, Ronald Woods, was denied a trial which can be deemed fundamentally fair. This trial, conducted in rural Florida, resulted in Mr. Woods' capital conviction and sentence of death. As discussed herein, the Court of Appeals carefully considered the Florida Attorney General's assertions, the undisputed facts involved in this case,[1] and this Court's settled precedents. The Court found that "[t]he case at hand is one of those 'extreme' cases" in which it is clear that the defendant was denied a fundamentally fair trial. Woods v. Dugger, 923 F.2d 1454, 1459 (11th Cir. 1991). The Attorney General's requests for rehearing and rehearing en banc were thereafter denied by the Court of Appeals, with no Judge serving on the Court suggesting that the case should be reheard (see Woods v. Dugger, No. 89-3420, Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc, February 5, 1991, Petitioner's Appendix A-4).

The ruling of the Court of Appeals also noted that although relief was appropriate in this case because of the denial of a fundamentally fair trial,

> The petitioner also raises an ineffective assistance of counsel claim and an erroneous denial of a continuance

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[1] We note that the Attorney General declined to argue before the Court of Appeals some of what the State now argues. The State's argument before the Court of Appeals is discussed in subsequent sections of this response.

> claim, both of which appear to merit evidentiary hearings . . . .

Woods, 923 F.2d at 1460. These claims challenged the conviction and death sentence, and independently entitled Mr. Woods to relief. The Attorney General has not contested this aspect of the Court of Appeals' opinion before this Court.

This response discusses the propriety of the ruling of the unanimous Court of Appeals, particularly in light of the rare, unique, and extreme circumstances involved in this case.[2] The Court of Appeals' decision was based upon settled precedents from this Court, and should not be reversed. Given the Court of Appeals' decision, its analysis, and the rare and extreme circumstances which infected the trial in this case, this is not an appropriate case in which this Court should grant the Attorney General's petition for writ of certiorari.

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[2] The Statement of Case portion of this response discusses, inter alia, the Court of Appeals' decision and the parties' submissions below. It is our intent that the Statement provide a proper perspective of what was, and is involved, and at issue, in this case.

RESTATEMENT OF THE QUESTIONS PRESENTED

In light of the record, the parties' positions below, the relevant precedents, and the actual ruling of the Court of Appeals, Respondent respectfully restates the questions presented as follows:

(I) WHETHER THIS COURT SHOULD OVERRULE HOLBROOK V. FLYNN, 475 U.S. 560 (1986), AND A NUMBER OF ADDITIONAL SETTLED PRECEDENTS IN ORDER TO OVERTURN A DECISION OF A FEDERAL COURT OF APPEALS WHICH WAS CONSISTENT WITH THOSE PRECEDENTS AND WHICH THOUGHTFULLY APPLIED THEM TO THE TOTALITY OF THE CIRCUMSTANCES OF THIS UNIQUE, RARE, AND EXTREME CASE

(II) WHETHER CERTIORARI REVIEW IS APPROPRIATE WHERE THE COURT OF APPEALS BASED ITS RULING ON THE TOTALITY OF THE CIRCUMSTANCES OF THIS CASE AND ON A THOROUGH AND CAREFUL APPLICATION OF THIS COURT'S PRECEDENTS, WHERE THE COURT OF APPEALS GAVE DEFERENCE TO THE FINDINGS OF THE STATE COURTS AND DISTRICT COURT, AND WHERE THE STATE'S COMPLAINTS ARE INCONSISTENT WITH THE PARTIES' POSITIONS BELOW, THE RECORD, AND THE ACTUAL RULING OF THE COURT OF APPEALS

TABLE OF CONTENTS

Page

INTRODUCTION ii

RESTATEMENT OF THE QUESTIONS PRESENTED iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE AND PROCEDURAL HISTORY 2

I. PROCEDURAL HISTORY 2

II. STATEMENT OF THE CASE 7

A. The Eleventh Circuit's Analysis of the Facts 9

B. Ronald Woods' Submissions to the Court of Appeals . . . 13

C. The State's Submissions Before the Court of Appeals . . 26

D. The Court of Appeals' Analysis 29

ARGUMENT IN RESPONSE 34

(I)
THE COURT OF APPEALS' RULING WAS CONSISTENT WITH HOLBROOK V. FLYNN AND THIS COURT'S SETTLED PRECEDENTS 35

(II)
THE COURT OF APPEALS' RULING WAS BASED ON THE RECORD, ON THE TOTALITY OF THE CIRCUMSTANCES WHICH THAT RECORD REFLECTED ABOUT THE PROCEEDINGS IN THIS CASE, AND WAS NOT BASED ON THE PRETRIAL PUBLICITY ALONE, WHILE THE STATE'S COMPLAINTS ARE INCONSISTENT WITH THE REVIEW WHICH THE COURT OF APPEALS UNDERTOOK, THE PARTIES' POSITIONS BELOW, AND THE RECORD 43

CONCLUSION 47

CERTIFICATE OF SERVICE 48

TABLE OF AUTHORITIES

Page

Bundy v. Dugger,
850 F.2d 1402 (11th Cir. 1988) 29

Caldwell v. Mississippi,
472 U.S. 320 (1985) 25

Coleman v. Kemp,
778 F.2d 1487 (11th Cir. 1985) 29,38

Cox v. Louisiana,
379 U.S. 559 (1965) 21,33

Elledge v. Dugger,
823 F.2d 1439 (11th Cir. 1987) 25,26,28,29

Estelle v. Williams,
425 U.S. 501 (1976) 22,passim

Estes v. Texas,
381 U.S. 532 (1965) 20,passim

Hitchcock v. Dugger,
481 U.S. 393 (1986) 7

Holbrook v. Flynn,
106 S.Ct. 1340 (1986) . . . . . iii,passim

In re Little,
404 U.S. 553 (1972). 33

Irvin v. Dowd,
366 U.S. 717 (1961) 22,passim

Lockett v. Ohio,
438 U.S. 586 (1978) 7,21

Norris v. Risley,
918 F.2d 828 (9th Cir. 1990) 29,30,31,42

Satterwhite v. Texas,
108 S.Ct. 1792 (1988) 25,38

Sheppard v. Maxwell,
384 U.S. 333 (1966) 21,passim

Skipper v. South Carolina,
476 U.S. 1 (1986) 25

State v. Franklin,
327 S.E. 2d 449 (W.Va. 1985) 16

State v. Gens,
107 S.C. 448, 93 S.E. 139 (1917) 16

Strickland v. Washington,
466 U.S. 668 (1984). 8,28

United States v. Frady,
456 U.S. 152 (1982). 8,28

United States v. Rios Ruiz,
579 F.2d 670 (1st Cir. 1978) 16

Woods v. Dugger,
923 F.2d 1454 (11th Cir. 1991) . . . . . i,passim

Woods v. Florida,
107 S.Ct. 466 (1986) 5,20

Woods v. State,
490 So.2d 24 (Fla. 1986) 5,passim

Woods v. State,
531 So.2d 79 (Fla. 1988) 1,6

OPINIONS BELOW

The Respondent, Ronald Woods, respectfully supplements the listing in the Attorney General's petition with a reference to Woods v. State, 531 So.2d 79 (Fla. 1988), the opinion of the Florida Supreme Court relating to Ronald Woods' application for post-conviction relief. During those proceedings, Mr. Woods again challenged the proceedings resulting in his capital conviction and death sentence as being fundamentally unfair, and presented a number of facts in support of the claim which had not been reflected by the record on direct appeal. The Florida Supreme Court, however, ruled that it would not allow a hearing, as the claim had been reviewed on direct appeal. Woods, 531 So.2d at 82. A copy of this opinion is appended hereto.

JURISDICTION

The Respondent agrees with the statement presented in the Petitioner's submission.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Respondent agrees with the Petitioner that this case involves the Sixth and Fourteenth Amendments to the United States Constitution, but respectfully submits that this case involves no Tenth Amendment issues. The Respondent also respectfully supplements the Petitioner's submission with a reference to the Eighth Amendment to the United States Constitution.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

I. PROCEDURAL HISTORY

The opinion of the Eleventh Circuit Court of Appeals is reported as Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991). A copy of the opinion is appended hereto. The State's petition for rehearing and suggestion for rehearing en banc was denied on February 5, 1991, with "no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc" (Petitioner's Appendix A-4, Woods v. Dugger, Court of Appeals Order of February 5, 1991). The previous procedural history of this case was summarized by Mr. Woods at pp. 1-7 of his brief to the Court of Appeals, with specific references regarding the claim at issue. This summary is reproduced immediately below.

Ronald Woods was convicted of first-degree murder in connection with the stabbing of a correctional officer at the Union Correctional Institution at which Mr. Woods and codefendant Leonard Bean were incarcerated.[3] Ronald Woods was 18 years old

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[3] The incident occurred on May 5, 1983, and involved a number of correctional officers and inmates. Mr. Woods and Mr. Bean were jointly tried in Union County, Florida. Pretrial requests for continuance filed by defense counsel in order to prepare were denied. The jury returned a guilty verdict and judgment of conviction was entered on October 14, 1983. During post-trial proceedings, Leonard Bean provided undersigned counsel with an affidavit, presented to the lower courts, describing the incident. In the affidavit Mr. Bean explained that he killed the correctional officer and that Mr. Woods would not have been involved if he had not been prodded by others.

at the time of the offense.[4] Mr. Woods was and is mentally retarded, developmentally impaired, brain damaged, mentally ill, and emotionally deficient.[5] The sentencing court found age as a statutory mitigating factor, but the facts relating to Mr. Woods' mental health impairments were never adequately developed at the

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[4] The trial evidence concerning the offense reflects an outburst by inmates at the Union Institution which resulted in Officer Dennard's death. Correctional Officer Anderson, who was with Officer Dennard at the time of the incident, testified that Mr. Woods and Mr. Bean had no way of knowing that Officer Dennard would be at the main housing unit when the incident occurred (R. 1350-51). His account, like that of the other officers who testified and of the medical examiner, reflected that Bean was the prime instigator. The inmates involved were Black and the officers were White. Racial tensions had been high at the prison, as well as tensions arising from the conditions at the institution, and the activities of gangs of inmates (e.g., the "Dixie Playboys") and of guards (e.g., the "Goon Squad") were being investigated by the Department of Corrections.

The only evidence that Mr. Woods actually killed the decedent was the testimony of inmate "Fat Jack" Thomas. Thomas was the only White inmate who claimed to have witnessed the incident--the other evidence was that the inmates in the area were Black. Thomas had been disciplined by the Department of Corrections for attempting to organize a White supremacist gang at the Union Institution (R. 1964). Thomas attempted to incite a race riot at the Union facility which the authorities were able to stop by putting the prison under lock-down (R. 1964). Thomas' racial activities continued after he was transferred to other institutions, and he was transferred six times in a handful of months because of his racist activities (R. 1968). The record reflects that there were at least 20 witnesses (inmates and officers), but Thomas' testimony was not corroborated. Thomas testified that he continues to refer to Black people as "niggers" even though it causes him "trouble" (R. 1968). The record also suggests evidence concerning prison gangs' involvement in the incident (R. 1748). The account now provided by Mr. Bean is consistent with much of the evidence, and inconsistent with Thomas' testimony.

[5] At the time of the offense Mr. Woods was "under sentence" of imprisonment for "arson". The arson arose from an incident in which Ronald Woods, who was then in his mid-teens and incarcerated in an adult prison, set fire to his mattress because he was cold and frustrated. The sentencing court found "under sentence" of imprisonment as one of two applicable aggravating factors.

time of the 1983 trial and sentencing proceedings because of the deficiencies of defense counsel; moreover, significant evidence relating to the circumstances of the offense was not heard because of counsel's deficiencies and the trial court's denial of continuance. The Court of Appeals indicated that these claims, independent of the claim upon which relief was granted, "appear to merit evidentiary hearings in the district court. However, in order to avoid issuing an advisory opinion we will not reach these questions." Woods v. Dugger, 923 F.2d at 1460.

The jury recommended a death sentence by a vote of 7-5, and the court imposed that sentence.[6] The sentencing judge found two aggravating factors (under "sentence of imprisonment"/ "hindering or disrupting the corrections program of Union Correctional Institution" (R. 653)), a statutory mitigating factor (age (R. 654)), and, as the district court found, did not properly consider nonstatutory mitigation. The sentencing court rejected the statutory mental health mitigating factors because the evidence presented by counsel on those issues "consisted essentially of test results that indicated a low intelligence quotient ..." (R. 654).[7]

The conviction and death sentence were affirmed on direct

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[6] Codefendant Leonard Bean is intellectually deficient, although not mentally retarded. He does not suffer from deficits such as Mr. Woods'. His attorney, however, developed and presented the mitigating evidence which was available concerning his client, and his client received a sentence of life.

[7] As pled in the petition for writ of habeas corpus and discussed in Mr. Woods' brief to the Court of Appeals, much, much more substantial mental health and other mitigation was available for presentation to Mr. Woods', jury and judge. This evidence was not presented because of the deficiencies of counsel.

appeal, Woods v. State, 490 So.2d 24 (Fla. 1986), over a dissent which noted, as to the claim upon which the Court of Appeals would subsequently grant relief:

> [T]he presence of approximately forty-five corrections officers in uniform, approximately half the public in attendance ... denied appellant a fair trial ... Union County is a small county and [many of the county's] citizens ... either work for the Department of Corrections or are related to such workers ... The presence of forty-five uniformed corrections officers is ... no less prejudicial than the presence of forty-five friends of a murder victim appearing en masse at the trial of the accused assailant, bearing signs expressing their concerns regarding the outcome of the trial. Exhibitions of this nature have no place in a court of law because of the great possibility of jury intimidation or coercion. Having denied appellant's motion for a change of venue, the trial court assumed the heavy burden of ensuring that the fairness of the trial was not compromised ...

Woods, 490 So.2d at 28 (Shaw, J., dissenting). The majority ruled that "although the question is close," it would not reverse. Id. at 27.

Mr. Woods filed a petition for writ of certiorari which was denied on July 18, 1986.[8] Mr. Woods thereafter pursued state collateral relief remedies under Fla. R. Crim. P. 3.850, the

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[8] See Woods v. Florida, 107 S.Ct. 446 (1986). Justices Blackmun and Brennan dissented, noting:

> In view of the presence in the courtroom throughout the trial of a substantial number of uniformed guards (up to as many as 45) and the trial court's denial of petitioner's request to clear the courtroom of uniformed spectators, and the failure of the Supreme Court of Florida in its opinion ... even to cite this Court's recent decision in Holbrook v. Flynn, I would grant the petition for certiorari ... and remand the case to the Supreme Court of Florida for reconsideration in light of Holbrook.

Id. at 447. Justices Marshall and Brennan also dissented on additional grounds. Id. at 446.

trial court denied relief, and the Florida Supreme Court thereafter also denied relief, by a vote of 4-3. Woods v. State, 531 So.2d 79 (Fla. 1988).[9] Among the issues presented by Mr. Woods were the claims of ineffective assistance of counsel and the Holbrook v. Flynn claim. Mr. Woods presented a number of facts, including affidavits and other documents and publications, in support of the claim which had not been disclosed by the record on direct appeal. However, the State opposed an evidentiary hearing, and the state trial court and Florida Supreme Court declined to allow one.[10]

The petition for writ of habeas corpus was filed in October of 1988. Mr. Woods requested that the District Court allow an evidentiary hearing (see, inter alia, R., Vol. 2, Doc. 10),[11] but the State opposed the request, and the District Court denied the request. The District Court did accept further written submissions from the parties, conducted a brief oral argument, and thereafter denied relief as to the claims presented except with regard to Claim VIII of the petition for writ of habeas

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[9] Two dissenting Justices explained that Mr. Woods' execution was prohibited by the federal and state constitutions because of his age and the evidence relating to his psychological impairments presented to the state courts in the post-conviction action, see Woods, 531 So.2d at 83-84 (Barkett and Kogan, JJ., dissenting), while a third Justice dissented for these same reasons but on state constitutional grounds alone. Id. at 83 (Shaw, J., dissenting).

[10] The Florida Supreme Court held with regard to the Holbrook v. Flynn claim that, "This Court considered the prejudice claim on direct appeal." Id. at 82.

[11] The citation method employed herein is the same as that employed before the Eleventh Circuit Court of Appeals. References to the record before that Court include the record volume and document number (e.g., "R. Vol.___, Doc.___").

corpus (R., Vol. 2, Doc. 23 [District Court Opinion and Order, February 21, 1989 [hereinafter "Order"]), petitioner's Hitchcock/Lockett claim. With regard to this issue, the District Court ordered

> [t]hat the state trial judge shall within 180 days of the date of this order resentence petitioner considering all the evidence presented at petitioner's original sentencing proceeding as well as the jury's recommendation of death, and the state trial judge shall then prepare a new judgment and sentence for petitioner that comports with the requirements of Hitchcock v. Dugger.

(Order, p. 42).[12] Both parties sought rehearing pursuant to Fed. R. Civ. P. 59 (R., Vol. 3, Docs. 25 and 26), and both motions were denied (R., Vol. 3, Doc. 28). The District Court granted a certificate of probable cause to appeal (R., Vol. 3, Doc. 32).

II. STATEMENT OF THE CASE

The Attorney General's statement of the case does not fairly disclose what this case actually involves, what the Court of Appeals actually said, or what the parties' positions were below. As to the former, the Respondent attempts to provide a fuller

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[12] Since then, the State scheduled that proceeding and the trial judge re-entered an order sentencing Mr. Woods to death on August 28, 1989. The proceeding was conducted without a jury. This was a separate state court action from the proceedings at issue on the Attorney General's petition for writ of certiorari. The Court of Appeals made the following observations concerning this separate proceeding:

> This Court notes that a resentencing hearing was held on April 23, 1989. The record of this hearing reflects that the gallery of the courthouse was once again filled with a large group of uniformed corrections officers....

Woods v. Dugger, 923 F.2d 1454, 1461 n. 14 (11th Cir. 1991).

account herein. As to the latter, Mr. Woods outlines in sections II (B) and (C), infra, the arguments which the State and Mr. Woods presented to the Court of Appeals, noting at this juncture that in the Court of Appeals the State did not contest the facts which Mr. Woods submitted in support of this claim, that the State opposed an evidentiary hearing, that the State could point to no state interest furthered by the presence of the armed and uniformed corrections officers who packed the courtroom,[13] and that the State argued, "[E]ven assuming the presence of these officers may be considered inherently prejudicial per se, Woods is unable to show 'actual prejudice'... [under] Strickland v. Washington, 466 U.S. 668 ... (1984) and United States v. Frady, [456 U.S. 152 (1982)]." [Eleventh Circuit] Brief of Cross Appellant and Answer Brief of Appellee, pp. 27-28 (hereinafter "State's Brief").[14] As to what the Court of Appeals actually said, Mr. Woods quotes the Eleventh Circuit's factual recitation

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[13] These were corrections' officers, not court personnel. See Woods v. Dugger, 923 F.2d 1454, 1460 (11th Cir. 1991) ("The corrections officers were not present to escort any prisoners and they were not part of the courtroom security .... [T]he officers were present on their own time and not as witnesses... [Department of Corrections rules] state[d] that 'the uniform ... is not to be worn during off-duty hours or when the employee is not acting in an official capacity...' [N]o state interest can justify the uniformed presence of these off-duty correctional officers....") Florida Department of Corrections Rules expressly prohibited them from appearing in uniform, in court, in this way, as the Court of Appeals noted. Id. As the Court of Appeals further noted, no state interest was presented to justify their actions. See Woods, 923 F.2d at 1460 ("The state in the present case does not, and cannot, justify the presence of the uniformed corrections officers.")

[14] This claim involved no procedural bars, as the State agreed, and no issues relating to ineffective assistance of counsel.

immediately below and discusses the Court's analysis subsequently in section D.

A. The Eleventh Circuit's Analysis of the Facts

The Eleventh Circuit provided the following recitation concerning some of the pertinent facts:[15]

> Turning to the record, we note that the trial was held in Union County, Florida. Union County is a small rural county in Northern Florida. Just over ten thousand people live in Union County, but one-third of those are prisoners. Tate Rose, What Life is Like in a Place Where Half the Residents are Behind Bars, Chicago Tribune, October 21, 1985, at Tempo Sect. p. 1, col. C. In the neighboring counties of Bradford and Union there are four state prisons which employ twenty-two hundred workers, and the prisons are responsible for $71 million of the local economy. Stuart, A Town's Fact of Life: The Death Row Prison, New York Times, April 6, 1984 at Sect. A, p. 14, col. 1. The Florida Statistical Abstract also reports that Union County is one hundred percent rural, Florida Statistical Abstract 3 n. 2, 13 (Shermyen, ed. 1989), and that thirty-two hundred people are employed outside of the home. Id. at 171.
>
> The jury was drawn exclusively from Union County. Richard Dugger, the State Secretary of Corrections, told the New York Times, in a reference to the town of Starke in neighboring Bradford County, "The only time the community takes note of what's going on at the prison ... is when a guard is killed." Nordheimer, "Town Pays Little Mind to Executions," New York Times, Sept. 8, 1984, at Sect. 1, p. 6, col. 3.
>
> Union County took note of the murder of Corrections Officer Dennard. Prior to his death, he was interviewed by the St. Petersburg Times. He told the paper that the Union Correctional Institution was dangerously understaffed and that he wanted to be transferred because he feared for his safety as a prison guard. Officer Dennard's death became a focal point for the lobbying efforts of a group called the United Correctional Employees in their demands for the government to hire more correctional officers. United Press International, June 23, 1983. After Officer

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[15] There are many additional facts supporting the claim. In its recitation, however, the Eleventh Circuit was apparently attempting to provide a flavor of what this case involved.

Dennard's death, his sister began a petition that she reported was "going like hot cakes" and had gathered hundreds of signatures. United Press International, May 28, 1983. By the time of Mr. Woods' trial, defense counsel told the court that the petition had 5,000 signatures, not all of which, however, were from Union County residents. The petition stated "its [sic] time we started punishing the guilty and protecting the innocent" and demanded the death penalty for those who kill prison guards. Id.

The effect of the killing on this community is evidenced in the answers obtained on voir dire.[16] Of the forty-one potential jurors excused either peremptorily or for cause, six immediately excused themselves. Consequently, the record reveals no information about these six. Of the remaining thirty-five potential jurors who were eventually excused: thirty-three had relatives or close friends who worked in the prison, or the jurors had worked in the prison themselves; twenty-one of the excused jurors had heard of the case; nine knew a witness; and one was a witness who was not called by either side. Within the actual jury: four jurors and one alternate juror neither had heard of the case nor had any relatives working in the prison system; four jurors had not heard of the case, but had either worked in the prison system themselves or had relatives currently working in the system; three jurors and one alternate juror both had heard of the case and had relatives currently working in the system; and, finally, one juror had heard of the case but had no relatives or friends working in the system.[17]

In addition, the gallery of the courtroom was filled with spectators. The defense counsel raised several objections to the presence of prison guards in the gallery, and the court ordered a videotape and photographs taken of the gallery. The photos revealed that the gallery had four rows which could each seat about ten or eleven people. Virtually every seat was occupied, and several people were standing in the back of the courtroom. About half of the spectators

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[16] The footnote stated: "First, it should be noted that current prison employees were excluded from the potential venire."

[17] The footnote stated: "As a side note, an example of how small the county was, the jury contained one juror who was the mother of another juror and a juror who knew the husband of another juror."

appeared to be wearing prison guard uniforms.[18]

The state attempts to downplay the significance of the spectators in two ways. The state argues: (1) most of the officers in the gallery were witnesses who testified in uniform at trial, and (2) the officers were present only during closing arguments.

The state's first argument is not factually supported. The state is correct in noting that fourteen corrections officers testified at trial. And, the state is correct in that the trial court noted just before closing argument that "many of the uniformed persons in the courtroom, that I have observed, are persons who testified in their uniform during the course of the trial." The court's comment can be true only about the gallery during closing arguments. We must infer from the record that there was a substantial number of non-witnesses present in uniform prior to closing arguments because at the close of evidence, the day before closing argument, the defendant moved for a mistrial on the basis of the large number of officers in the audience. At this point, none of the witnesses were present in the gallery because the rule of sequestration had been invoked at the start of the trial and the state explicitly maintained the rule for all its witnesses up until closing arguments. Moreover, the fact that the witnesses testified in uniform at trial [19] does not lessen the prejudice of their showing up in uniform to hear closing arguments at a later time.[20] The prejudice does not depend on whether the uniformed guards were witnesses or not. The prejudice arises from the presence of the uniformed corrections officers in the context of a trial being held in the midst of an angry community.

The state makes the additional claim that the audience was present only during closing arguments. By

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[18] The footnote stated: "Woods also alleges, and the state has not denied, that there was excessive security utilized as a show of force at the trial. Woods claims that there were guards with shotguns on the courthouse roof, on the courthouse steps and in the courthouse lobby. Woods claims that the jurors had to walk through this fortress-like atmosphere every day. While these allegations may or may not be true, we do not rely on them to reach our conclusion."

[19] The footnote stated: "Evidence was taken only on Tuesday, Wednesday, and Thursday."

[20] The footnote stated: "Closing arguments were heard on Friday."

examining the record, it is clear that uniformed guards were present in the gallery at the very least during voir dire, closing argument, and throughout the sentencing phase of the trial. The record is replete during those portions of the trial with the trial judge's comments to the spectators telling them when the trial will resume following breaks and requesting them to be in their seats before the jury returns. The trial judge also at times admonished the crowd to remain quiet and not make audible responses. Furthermore, the judge told the spectators to go to the lobby while the jury deliberated during the guilt phase. The record also reflects that spectators, including the uniformed guards, were present during the trial, despite the lack of admonitions from the bench, because the closing arguments were not made until Friday morning, yet the defense counsel make their objection and moved for a mistrial at the close of all the evidence on Thursday evening.

This Court has in the past noted that presumed prejudice rarely occurs and "is reserved for extreme situations." Bundy v. Dugger, 850 F.2d 1402 (11th Cir. 1988). The case at hand is one of those "extreme" cases. While the pretrial publicity may not be sufficient to rise to the level where we can presume prejudice to Mr. Woods, the publicity must be viewed in the context of the complete trial. Unlike the trial disputed in Bundy, Woods' trial was marred by the presence of uniformed spectators in the courtroom as well as by the pretrial publicity. Viewing the totality of the circumstances, we have no choice but to conclude that there was "an unacceptable risk [of] impermissible factors coming into play." Holbrook v. Flynn, 475 U.S. at 570, 106 S.Ct. at 1346.

The officers in this case were there for one reason: they hoped to show solidarity with the killed correctional officer. In part, it appears that they wanted to communicate a message to the jury.[21] The message of the officers is clear in light of the extensive pretrial publicity. The officers wanted a conviction followed by the imposition of the death penalty. The jury could not help but receive the message.

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[21] The footnote stated: "It is a mistake, however, to weigh the First Amendment speech rights of the officers against the Sixth Amendment rights of Mr. Woods, for that case is not before this Court. We express no opinion on whether the trial court may muzzle the free speech of the officers. We only hold that if the officers choose to speak in the manner that they chose - the Sixth Amendment rights of Mr. Woods are violated."

Woods v. Dugger, 923 F.2d 1454, 1457-60 (11th Cir. 1991).

B. Ronald Woods' Submissions to the Court of Appeals

Mr. Woods discussed this claim at pp. 17-31 of his Initial Brief to the Court of Appeals. He presented a summary of the facts reflected in the trial record and the facts presented to the state courts and federal courts during post-conviction and habeas corpus proceedings. These latter submissions included sworn affidavits and other documents and publications. The facts presented by Mr. Woods were not contested by the State before the District Court or Court of Appeals. See e.g., Woods, 923 F.2d at 1460 n.13. The factual and legal analysis presented by Mr. Woods' brief to the Court of Appeals is reproduced immediately below. "R." refers to the state court record on direct appeal,[22] "PCR" refers to the state court post-conviction record, and "Order" refers to the District Court order.

This case involves a prison killing in which two young Black males allegedly killed a White prison guard. Union County, Florida, is a small rural county, and the state prisons are the major employer. Virtually every prospective juror questioned in this case either had friends or relatives who had worked at the prisons (see, e.g., R. 45, 48, 49, 50, 51, 52, 54, 86, 89, 96, 97, 108, 129, 136, 152, 153, 166, 234, 235, 255, 258, 270, 272, 286, 310, 311, 312, 325, 326, 343, 365, 366, 369, 379, 389, 410), or they had worked there themselves (see, e.g., R. 127, 129, 179,

[22] The direct appeal record in this case can be characterized as a mess. The state and Mr. Woods challenged portions of the record during post-conviction proceedings. Mr. Woods presented a claim relating to these issues at pp. 63-75 of his brief to the Court of Appeals.

255, 297, 301, 302, 394).[23] Numerous assaults on correctional officers had occurred since Mr. Woods' arrest.[24] Community feelings were especially high and tense, as evidenced by three petitions which circulated in the community, pre-trial, urging stronger protection for guards and containing hostile statements directed specifically at the defendants in this case (R. 1056, 1060). Several jurors had seen the petitions, which had been posted in stores in the community (R. 1009, 1060). 5,000 people signed one of the petitions (See Petition for Writ of Habeas Corpus, p. 8).[25] Although several jurors stated that they had seen the petitions, no one would allow defense counsel to see them (PCR 368-69).[26]

The courtroom was in the heart of what locals call prison guard territory. As the prosecutor noted at sentencing, the loss of the victim was a personal one for the prosecutor, as well as for the judge. That courtroom is a very small one, in a small courthouse, in a small rural county. A motion for change of venue was denied, as was counsel's request that the uniformed officers be cleared from the courtroom.

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[23] The Court of Appeals' analysis of the actual trial jury speaks to those who had relatives who worked for the prisons; virtually all the jurors had friends who worked there, however.

[24] Documents speaking to these facts were introduced by Mr. Woods during post-conviction proceedings. Respondent takes issue with the Attorney General's assertion before this Court that the Court of Appeals inappropriately relied on extra-record facts, and discusses these matters in subsequent portions of this response.

[25] See n. 24, supra.

[26] See n. 24, supra.

Every seat was taken in the spectator section during trial and sentencing: At least half of them were occupied by an armed correctional officer in full uniform. Other officers in uniform stood along the walls. The trial judge noted during the proceedings that eighty to ninety people were seated, at least half of whom were uniformed correctional officers, a fact noted by the Florida Supreme Court in its opinion on direct appeal. See Woods v. State, 490 So.2d 24, 27 (Fla. 1986). See also id. at 28 (Shaw, J., dissenting on denial of relief on this issue). Additionally three or four uniformed guards sat directly behind counsel table. Photographs taken during the proceedings reflect the truly pervasive nature of the correctional guards' presence.[27]

Defense counsel requested that the state and trial court do something about it--remove them (R. 2136). The state and trial court refused to take action. See Woods, 490 So.2d at 27. A motion for mistrial was denied. The guards who packed the courtroom were clearly not on their way to or from work, and their uniformed presence in court was a blatant attempt to show the jurors and judge their power in the community.[28]

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[27] Certified copies of some of these photographs were appended to Mr. Woods' petition. The photographs show that more than half of the small courtroom was packed with these officers. See also Woods, 923 F.2d at 1458 and n. 7 (discussing the photographs and the "show of force" which "the State has not denied.")

[28] The Florida Supreme Court itself noted that the officers were there throughout the proceedings. Woods, 490 So.2d at 27. The correctional officers were not there for security purposes or at the court's request. But they were there armed and in uniform (See District Court Order, p. 14)(Noting that it is undisputed (continued...)

It was, and is, completely against Florida Department of Corrections regulations for correctional officers to appear in public, in uniform, in this manner. The Department's express rules specifically provide that correctional officers' uniforms or any clothing "furnished by the Department [of Corrections] is not to be worn during off-duty hours or when the employee is not acting in an official capacity, except when traveling to and from work" (See Petition for Writ of Habeas Corpus, p. 10, quoting Department of Corrections Rule 33-4.07; see also PCR 289-304 [Department of Corrections regulations]). The officers by attending court in their uniforms in violation of their own regulations were acting intentionally and consciously to intimidate and influence the factfinders.[29] The members of this small prison community (i.e., the jurors) knew that uniforms could not be worn except for an official purpose. The message was that the guards were there for official reasons, en masse and armed. But they certainly were not there for any official reason. The State and the court were asked to stop it, but did not.

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[28](...continued)
that "numerous armed correctional officers" were in the courtroom during the proceedings). Mr. Woods' trial counsel considered this case one of the most difficult of his career because of the expressed, overwhelming community anger (PCR 368).

[29] Mr. Woods' brief explained that the officers' uniforms were equivalent to the posters in State v. Gens, 107 S.C. 448, 93 S.E. 139 (1917); the large, bright yellow buttons in State v. Franklin, 327 S.E. 2d 449 (W.Va. 1985); and the presence of the uniformed police in United States v. Rios Ruiz, 579 F.2d 670 (1st Cir. 1978), cases discussed by Justice Shaw in his dissent and referred to by the Florida Supreme Court majority on direct appeal. See Woods, 490 So.2d at 27.

Department of Corrections rules also prohibited correctional officers from carrying guns, except when authorized for official business within their employment. However, during Mr. Woods' trial, correctional officers armed with rifles, handguns and/or shotguns "secured the perimeters" of the small courthouse. When court was actually in session, these armed officers relaxed their watch, and mingled with friends and other spectators on the steps of the courthouse and on its first floor. As found by the District Court (see Order, p. 14), numerous correctional officers with guns were in the courthouse during the trial and sentencing. The jurors--arriving in the morning, leaving in the evening, being escorted through the grounds at lunch time--were clearly exposed to the highly charged and unduly provocative atmosphere created by the presence of the many guns and uniforms.

The jurors had to walk directly through the uniformed officers when entering and leaving the courtroom, and saw them in the courtroom itself throughout the proceedings.[30] The record of this trial is in fact rife with references to futile attempts to keep Mr. Woods' jurors from the overbearing presence of the officers. Those attempts, however, illustrate and emphasize the unacceptable risk of the jurors' having been affected by their presence:

> THE COURT: Please listen carefully, and ladies and gentlemen in the audience.
>
> It will be the ruling of this Court, and

[30] Contrary to the Attorney General's current suggestion, the Florida Supreme Court, the District Court, and the Eleventh Circuit each noted that the uniformed officers were present throughout the proceedings.

direction to the audience in the court, that, during the recesses, until further ordered, during the process and progress of this trial, you are to leave the second floor, leave the landing, and come no further than the first floor.

Prior to Court resuming, you will be notified. Please come back in and be in place before the Court resumes.

Excluded from this order will be the personnel of the State Attorney's office, members of the media, those people involved in security of the defendants, and the attorneys and the court officials.

Everyone else should go down to the first floor at this time.

When we resume the hearing, the trial, before we resume, you will be told by the bailiff and you will be allowed to come back and sit down.

The order concerning demonstrations and movement during the arguments remains in effect.

Please leave the courtroom and the second floor at this time.

(R. 1375-1376). Because of the unique size and layout of this small courthouse, the harm that the judge sought to minimize by issuing directions such as those quoted above had already long occurred, as even the photographs show. Jurors had been in and out of the courtroom repeatedly, armed uniformed guards were all around outside and inside of the courtroom, and the jurors had received the message. There can be no question but that the presence of the uniformed guards was a deliberate attempt to intimidate and influence the factfinders.[31]

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[31] Mr. Woods' mother and her daughter Cynthia attended the proceedings (PCR 389). The family members were the only Black citizens in the courtroom, until Mr. Bean's mother and stepfather arrived (Id.). Before the end of the trial they were told by defense counsel that they needed more people with them, for their own safety (Id. at 39). They heard many hostile racial epithets, (continued...)

Other factors operated here to further inflame the already pervasively-prejudicial atmosphere created by the presence of the correctional officers. As noted above, the defendants' families were the only Black individuals in the courtroom at any time during the trial, other than one Black alternate juror and the defendants themselves. The already highly-charged atmosphere was infected with overtones of racial tension and animus.

Although it declined to allow a hearing, the District Court found that it was "undisputed" that during the proceedings "numerous armed correctional officers attended the trial and sat in the spectators' section of the courtroom" (Order, p. 14) (emphasis supplied). The District Court also stated "that the most likely inference that the jurors drew from the presence of the correctional officers in the courtroom, was that many correctional officers were co-workers of the victim," and that it was "highly probable" that the jurors would have believed "that the correctional officers would be interested in the trial" (Id., p. 15)(emphasis supplied).[32] These "findings", Mr. Woods noted, support, rather than reject, the claim. (Mr. Woods' brief then

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[31](...continued)
directed towards them (Id.; see also petition for writ of habeas corpus, p. 13 n.1). The atmosphere was heated, tense, and hostile, and could not but have influenced the jurors, themselves local citizens.

[32] The State's current assertion that the Eleventh Circuit did not defer to the findings of the District Court and Florida Supreme Court is not consistent with the record. The Florida Supreme Court and District Court each noted that the officers who were present throughout the proceedings were there to show solidarity with and support for the decedent. These facts were then expressly noted and relied on by the Eleventh Circuit. Woods, 923 F.2d at 1459.

discussed his position that the district court should have allowed an evidentiary hearing.)

The discussion in the brief continued with the following:

The Florida Supreme Court never applied the federal constitutional analysis established by cases such as Holbrook v. Flynn, 475 U.S. 560, 106 S.Ct. 1340 (1986), and Estes v. Texas, 381 U.S. 532 (1965).[33] However, Justice Shaw eloquently dissented, pointing out the unique problems reflected even by the undeveloped trial record. See Woods v. State, 490 So.2d at 28. As Justice Shaw summarized:

> An accused is entitled to a trial before an impartial jury unaffected by outside forces and influences. The presence of forty-five uniformed corrections officers is, in my mind, no less prejudicial than the presence of forty-five friends of a murder victim appearing en masse at the trial of the accused assailant, bearing signs expressing their concerns regarding the outcome of the trial. Exhibitions of this nature have no place in a court of law because of the great possibility of jury intimidation or coercion. Having denied appellant's motion for a change of venue, the trial court assumed the heavy burden of ensuring that the fairness of the trial was not compromised by the venue and the deep public interest in the trial.

Id. at 28 (emphasis added).

The Florida Supreme Court majority, however, failed "even to cite th[e United States Supreme] Court's then recent decision in Holbrook v. Flynn, ..." Woods v. Florida, 107 S.Ct. at 447 (Blackmun and Brennan, JJ., dissenting), when denying this claim, although it recognized that "the question is close." Woods, 490 So.2d at 27. A proper analysis under Holbrook, Mr. Woods then

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[33] Justices Blackmun and Brennan noted as much in their dissent from the denial of certiorari. See Woods v. Florida, 107 S.Ct. 446, 447 (1986).

explained, warranted relief.

Mr. Woods discussed the analytical framework established by this Court. In Sheppard v. Maxwell, 384 U.S. 333 (1966), the Court reversed the defendant's conviction for murder because the trial court had not fulfilled its duty to protect him from the inherently prejudicial atmosphere in the community, and did not control the disruptive influences in the courtroom. In Cox v. Louisiana, 379 U.S. 559 (1965), the Court held that a trial court must restrict conduct which has free speech components, in order to afford a litigant a fair trial. The Court there upheld the facial constitutionality of a state statute prohibiting picketing in or near courthouses. In justifying the statute as applied, the Court said:

> It is, of course, true that most judges will be influenced only by what they see and hear in court. However, judges are human; and the legislature has the right to recognize the danger that some judges, jurors, and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time of the trial.

Id. at 565.[34] Estes v. Texas, 351 U.S. 532 (1965), provides a similar constitutional framework, one especially appropriate in a case such as this: The public's right to access to a criminal trial does not overcome the accused's right to be fairly tried.

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[34] Jurors are much more subject to such influences than judges. Moreover, the jury and judge here were also Mr. Woods' capital sentencers, and the influence of the uniformed, armed officers' presence in this capital case created the substantial risk of an unacceptable result, while this Court has held that "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty" is what the eighth amendment protects against. Lockett v. Ohio, 438 U.S. 586, 605 (1978)(emphasis added).

In Holbrook v. Flynn, the Court held that the presence of four uniformed guards for security purposes at Holbrook's trial was standing alone not so inherently prejudicial that Holbrook was thereby denied his constitutional rights to a fair trial. The Holbrook analysis, Mr. Woods explained, revealed the proper framework for resolving the claim.

To justify its denial of relief, the Florida Supreme Court majority said that:

> 1. Union County is a small county where uniformed corrections employees are a common sight.
>
> 2. Prospective jurors, on voir dire, indicated that they would follow the evidence and the law in their deliberations and would not be swayed by outside influences.

Woods, 490 So.2d at 27. The Holbrook court specifically rejected the second reason:

> The Court of Appeals was correct to find that Justice Giannini's assessment of jurors' states of mind cannot be dispositive here. If "a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process," little stock need be placed in jurors' claims to the contrary. Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. This will be especially true when jurors are questioned at the very beginning of proceedings; at that point, they can only speculate on how they will feel after being exposed to a practice daily over the course of a long trial. Whenever a courtroom arrangement is challenged as inherently prejudicial, therefore, the question must be not whether jurors actually articulated but rather whether "an unacceptable risk is presented of impermissible factors coming into play" ...

Holbrook, 106 S.Ct. at 1346-47, citing Estes v. Texas, Sheppard v. Maxwell, Irvin v. Dowd, 366 U.S. 717 (1961), and Estelle v. Williams, 425 U.S. 501 (1976).

The first reason cited by the Florida Supreme Court also does not support a denial of relief. To the contrary, this fact and the fact that the jurors would have believed that the officers were there because they were "co-workers of the victim" (District Court Order, p. 15), support Mr. Woods' claim.[35]

Although the Holbrook court found that the presence of four uniformed state troopers (who, as opposed to Mr. Woods' case, had to be there for security reasons, id., 106 S.Ct. at 1347), in the courtroom did not deny the petitioner a fair trial, the Court also observed:

> We do not minimize the threat that a room full of uniformed armed policemen might pose to defendant's chances of receiving a fair trial.

Holbrook, 106 S.Ct. at 1347, citing ABA Standards for Criminal Justice 15-3.1(c)(2d ed. 1980). Here, there were at least four uniformed guards sitting immediately behind the defendants. In the small gallery there were at least 45 more. The issue thus presented by this case, Mr. Woods submitted, was whether a roomful of uniformed and armed (White) corrections officers at the racially charged trial of a (Black) prisoner charged with killing a White guard in a small community where the primary employer is the prison system unfairly influenced the jury with the community's opinion of the prisoner's guilt. The presence of 45 uniformed and armed corrections officers, at least half the spectators, unlike the four troopers in Holbrook, certainly

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[35] The citizenry of this small county knew that weapons and uniforms were only to be worn for "official" reasons. If the officers went there only to watch, why the unauthorized uniforms and why the weapons? Their status as "coworkers of the victim" only enhanced the prejudice in this "small county."

branded Mr. Woods in the jurors' eyes. And, unlike the situation in Holbrook, it is undisputed in this case that these officers were not there for any official security reason.

Mr. Woods' brief then discussed that the error did not end at the guilt-innocence phase. This was by no means a highly aggravated case--the trial judge found two aggravators, each virtually automatic on the facts of any prison homicide case (under sentence of imprisonment/hindering corrections' programs).[36] The jury and judge learned that Mr. Woods was barely 18 when the offense occurred and that he had been incarcerated in adult prisons as a boy, throughout his teens. The court found age as a statutory mitigating factor. Even though it did not come close to mirroring the wealth of significant mental health and other mitigation which was available and which the jurors should have heard, evidence was presented (through Dr. Krop) which shed some light on Mr. Woods' impairments. For example, the jury learned that Mr. Woods was impaired in such a way that he was unable to "add four apples plus five apples," that he could not define the word "winter", that he did not know how a banana and an apple are similar (See R. 1547-48).[37]

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[36] The Florida aggravators which are traditionally found to set capital cases apart from other murders ("heinous, atrocious, cruel"/"cold, calculated, premeditated"/"pecuniary gain") did not exist and were not found in this case. Further, the State's sentencing argument had much of its basis in the testimony of "Fat Jack" Thomas, the white supremacist whose account was discussed previously.

[37] Interestingly, these questions were asked of Dr. Krop by the judge at the sentencing hearing. Defense counsel, unprepared, never even would have elicited this information, but for the judge's assistance.

In a capital case jurors are placed "in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice," and thus when arbitrary, capricious, or unreliable factors may inject themselves into the jurors' thought processes, reversal of a capital sentence is appropriate. See Caldwell v. Mississippi, 472 U.S. 320, 333, 340-41 (1985). It is for this reason that this Court has placed the burden squarely on the State to prove beyond a reasonable doubt that impermissible factors had "no effect" on the defendant's sentence. See Caldwell, 472 U.S. at 341; Skipper v. South Carolina, 476 U.S. 1, 8-9 (1986); Satterwhite v. Texas, 108 S.Ct. 1792, 1797-98 (1988). The armed and uniformed correctional officers here provided precisely such arbitrariness, capriciousness, and unreliability. Cf. Satterwhite, 108 S.Ct. at 1797-98; Skipper, 476 U.S. at 8 ("Nor can we confidently conclude that [the error] had no effect upon the jury's deliberations").

Mr. Woods' brief then discussed Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987). In Elledge, the Court had before it a case involving a defendant who had been shackled during his capital sentencing. The circumstances in Elledge, if anything, were less egregious and prejudicial than those which Mr. Woods faced. See Elledge at 1451-52 (discussing the security concerns attendant to the shackling, concerns which obviously did not exist in Mr. Woods' case--the armed, uniformed officers who packed Mr. Woods' courtroom were certainly not there for security reasons). The Elledge court noted that Holbrook "means what it says" and applies to capital proceedings. Elledge, 823 F.2d at

1451 n.22. Following the Holbrook analysis, the Elledge court explained that a reviewing court must give "close judicial scrutiny" to circumstances such as those faced by Mr. Woods, Elledge at 1451, should assess if there was an "essential state interest furthered" by the procedure, id. at 1451, citing Holbrook, 106 S.Ct. at 1345,[38] and should determine whether less onerous alternatives existed. Id. at 1451, citing Holbrook.[39]

Mr. Woods' brief concluded by explaining that just as relief was appropriate in Elledge, relief was appropriate in his case.

C. The State's Submissions Before the Court of Appeals

In the Court of Appeals the State's argument on this issue was related at pp. 25-29 of the State's Brief. Although the State disputed neither the facts proffered with Mr. Woods' petition for writ of habeas corpus nor the documentation filed in support of the petition, the State limited its discussion to those aspects of the proceedings relating to the closing arguments, and said little about the officers' presence during other portions of the trial. The State opposed Mr. Woods' request for an evidentiary hearing.

The State's discussion opened as follows: "There is no

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[38] None was "furthered", existed, or was asserted by the State in Mr. Woods' case.

[39] Obviously, here there were many less onerous alternatives which were readily available to the trial court. Ironically, the less restrictive alternatives here were much more lawful than what actually occurred. The officers were not there at the court's request, and were not there because of any specially ordered security measures. The officers did not have to be there in uniform (the Corrections Department rules prohibited it), and they did not have to show up brandishing shotguns and other weapons (the Corrections Department rules prohibited this as well).

dispute that uniformed, armed correctional officers attended the closing arguments of the trial ..." (State's Brief, p. 25). The State then noted that it was not disputing that "[t]his issue was preserved" and "properly exhausted" and "subject to federal habeas review" (Id.)[40] The State then quoted R. 1318-19 (where, at the closing argument stage, the trial judge stated that "almost an even division of custodial correctional officers, uniformed people and people not so attired" were among the "80 to 90 people in the seats") (Id. at 25-26).

After this introduction the state argued that the "residents of this small community are no stranger to corrections officers" (State's Brief, p. 26), that federal review render Holbrook v. Flynn, 475 U.S. 560, 106 S. Ct. 1340 (1986), is limited (id. at 26-27), and that Mr. Woods had to demonstrate that the proceedings were "inherently prejudicial" and had to show "actual prejudice" in order to meet the State's interpretation of the Holbrook v. Flynn holding (Id at 27).[41] Each of these

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[40] See also id. at 26 ("The court preserved the point for appellate review by requesting photographs be made of the gallery which were included as part of the appellate record.")

[41] The Eleventh Circuit's discussion of this argument appears at footnote 3 of the opinion in Woods, 923 F.2d at 1457:

> The state claims that Holbrook v. Flynn requires the petitioner to prove both actual and inherent prejudice. The state points to the Court's statement that "if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over." Flynn, 475 U.S. at 572, 106 S.Ct. at 1347-48. We decline to follow the state's approach. First, such a reading would be a dramatic change in the law as initially set out in Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), and we decline to infer such a sub silentio
>
> (continued...)

submissions was addressed by the Court of Appeals.

The State's argument continued, "[E]ven assuming the presence of these officers may be considered inherently prejudicial per se, Woods is unable to show 'actual prejudice.' Actual prejudice has been defined as showing that but for the alleged omission or commission the outcome of the proceeding would have been different" (Id. at 27-28) (emphasis added). Although neither issues of procedural default nor ineffective assistance of counsel were involved in this claim, the State then cited to and argued on the basis of United States v. Frady and Strickland v. Washington (Id. at 28). The State further argued,

> Woods asserts there was no essential state interest furthered by the procedure of allowing the officers to observe the closing argument which fails to consider that the state as well as the defendant has the right to a speedy and public trial.

(State's Brief, p. 28). Finally, in an effort to respond to Mr. Woods' references to the Eleventh Circuit's analysis in Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987), the State argued,

> Furthermore, it is apparent that the Elledge decision from this Court was based on the United States Supreme Court's characterization of shackling as "an inherently prejudicial practice." The issue in this case was not Mr. Woods' shackling. Therefore, Elledge is inapposite to these facts.

(State's Brief, p. 29).

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[41](...continued)
change. Second, such a reading makes little sense. If the petitioner can prove actual prejudice nothing is gained by making him also prove inherent prejudice. We also note that the Ninth Circuit has recently interpreted Flynn to allow the petitioner to prove either actual or inherent prejudice. See Norris v. Risley, 918 F.2d 828 (9th Cir. 1990).

D. The Court of Appeals' Analysis

Before relating the outline of the facts quoted above (section A), the Court of Appeals summarized this Court's precedents and analyzed the standards which this Court has established as guiding review of circumstances such as those involved in this case. See Woods v. Dugger, 923 F.2d 1454, 1456-57 (11th Cir. 1991), analyzing and discussing, inter alia, Holbrook v. Flynn, 475 U.S. 560, 106 S.Ct. 1340 (1986); Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639 (1961); Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628 (1965); Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507 (1966); Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691 (1976). The Court also analyzed the Ninth Circuit's decision in Norris v. Risley, 918 F.2d 828 (9th Cir. 1990) -- a decision finding, on the basis of those same standards, that the buttons worn by certain spectators at that defendant's rape trial involved an "impermissible factor" which denied the defendant a fundamentally fair trial. See Woods, 923 F.2d at 1457, discussing Norris. (At the time of the decision in Woods, the Court of Appeals' ruling in Norris was the most recent ruling in this area from a Court of Appeals; the Norris decision has not been disturbed by any subsequent ruling). The Eleventh Circuit also discussed its own precedents. See Woods, 923 F.2d at 1456-57, analyzing Elledge v. Dugger, 823 F.2d 1439 (11th Cir.), modified on other grounds, 833 F.2d 250 (11th Cir. 1987), and Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985); see also Woods, 923 F.2d at 1459, discussing Bundy v. Dugger, 850 F.2d 1402 (11th Cir. 1988).

The Court's discussion did not stray from this Court's standards -- indeed, it strictly adhered to them. See Woods, 923 F.2d at 1456 ("The Fourteenth Amendment incorporates the essence of the Sixth Amendment right to be tried 'by a panel of impartial, "indifferent", jurors [whose] verdict must be based upon the evidence developed at the trial.'" [citations omitted].) Noting that this Court has consistently held that due process safeguards against "the intrusion of factors into the trial process that tend to subvert its purpose" and that due process may be violated when "the atmosphere in and around the courtroom [becomes] so hostile as to interfere with the trial process, even though ... all the forms of trial conform [to procedure]," Woods, 923 F.2d at 1456-57, citing Irvin v. Dowd and Estes v. Texas, the Court of Appeals discussed the "several cases in this Court, as well as in the Supreme Court" which involved such fair trial issues. Woods, 923 F.2d at 1457. The Court of Appeals noted that some such cases focus on security precautions while others focus on publicity and that the analysis in these cases involved an examination of the "totality of the circumstances." Woods, 923 F.2d at 1457, citing, inter alia, Holbrook v. Flynn and Sheppard v. Maxwell. In light of this Court's precedents, the Court of Appeals then "evaluate[d] the fairness of Woods' trial in light of both pretrial publicity and occurrences taking place during the trial." Woods, 923 F.2d at 1457.

Quoting Holbrook v. Flynn, Irvin v. Dowd, and Norris v. Risley, the Court of Appeals explained that the petitioner had to establish either inherent or actual prejudice. Woods, 923 F.2d

at 1457 and n.3. The State had not argued that the circumstances involved in this case were not inherently prejudicial. See section B, supra. Nonetheless, the Court of Appeals undertook a detailed analysis of the issue of inherent prejudice. The Court wrote, quoting the express language of Holbrook v. Flynn and Estelle v. Williams,

> The test for inherent prejudice is "not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play.'"

Woods, 923 F.2d at 1457, quoting Holbrook v. Flynn, 475 U.S. at 570, 106 S.Ct. at 1346 (quoting Estelle v. Williams). "This test requires us to examine two factors: first, whether there is an 'impermissible factor coming into play' and second, whether it poses an 'unacceptable risk.'" Woods, 923 F.2d at 1457, discussing Holbrook v. Flynn, Estelle v. Williams, and Norris v. Risley, 918 F.2d 828 (9th Cir. 1990).

The Court further explained that "[t]he [Estelle v.] Williams Court held that a risk becomes unacceptable" when there is a "probability of deleterious effects." Woods, 923 F.2d at 1457, quoting Estelle v. Williams, 425 U.S. at 504. The Court additionally related that this did not end the analysis,

> Should Woods be able to prove actual or inherent prejudice due to the presence of the uniformed prison guards then the state must justify their presence with an "essential state interest specific to [the] trial."

Woods, 923 F.2d at 1457, quoting Holbrook v. Flynn, 475 U.S. at

569, 106 S.Ct. at 1346.[42]

The Court of Appeals then presented the factual summary quoted above in section A. Thereafter, the Court related that under its precedents "presumed prejudice rarely occurs and 'is reserved for extreme situations'.... The case at hand is one of those 'extreme' cases." Woods, 923 F.2d at 1459 (citations omitted). "Viewing the totality of the circumstances, we have no choice but to conclude that there was 'an unacceptable risk [of] impermissible factors coming into play." Id. at 1459, quoting Holbrook v. Flynn, 475 U.S. at 570, 106 S.Ct. at 1346.

The Court explained, adhering to the findings of the state supreme court and District Court, that the officers "hoped to show solidarity with the killed correctional officer," Woods, 923 F.2d at 1459, and that particularly in light of the facts involved in this case, the conclusion arising from this finding was that:

> [I]t appears that they [the officers] wanted to communicate a message to the jury. The message of the officers is clear in light of the extensive pretrial publicity .... The jury could not help but receive the message.

Id. at 1459-60 (footnote omitted). The Court of Appeals, applying this Court's standards, then summarized:

> It is the purpose of the Sixth Amendment to guarantee the defendant a fair trial in which the jury reaches its verdict based only on the evidence

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[42] The Court noted that "no similar justification would rebut allegations of pretrial publicity." 923 F.2d at 1457 n. 4, citing Sheppard v. Maxwell. The State has referred this Court to no "state interest" of any kind justifying the circumstances involved in Mr. Woods' trial, and cited no such interest before the Court of Appeals or the District Court.

> subjected to the crucible of the adversarial process.[43] While this Court realizes that no trial can be perfect, some errors so prejudice the process that reviewing courts are unable to conclude that the verdict was based only on the evidence presented. Faced with such an error, we hold that the record demonstrates that the pretrial publicity combined with the large number of uniformed spectators rose to the level of inherent prejudice, thereby depriving the petitioner of a fair trial.[44]
>
> The Supreme Court in Holbrook v. Flynn, held that after a showing of prejudice resulting from the presence of uniformed officers, the state may rebut the showing with showing that the officers furthered an "essential state interest." 475 U.S. at 568-69, 106 S.Ct. at 1346. The state in the present case does not, and cannot, justify the presence of the uniformed corrections officers. The corrections officers were not present to escort any prisoners and they were not part of the courtroom security. Moreover, all testimony was concluded the day before oral arguments; therefore the officers were present on their own time and not as witnesses. Section III.C. of the Department of Corrections Policy and Procedure Directive regarding employees uniforms and clothing states that "the uniform ... is not to be worn during off-duty hours or when the employee is not acting in an official capacity, except when traveling to and from work." Under department rules, therefore, no state interest can justify the uniformed presence of these off-duty correctional officer.

Woods v. Dugger, 923 F.2d at 1460.

The Court also explained:

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[43] The footnote stated: "The Sixth Amendment imposes an obligation upon trial courts to minimize any risk of unacceptable factors affecting the accused's right to have a fair trial. This obligation is clearly distinct from any trial court authority that is derived from state statutes, see e.g., Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965), or from the courts' inherent contempt power. See, e.g., In Re Little, 404 U.S. 553, 92 S.Ct. 659, 30 L.Ed.2d 708 (1972) (per curiam). As should be clear from the facts of this case, the actions of the spectators and the effect of the pretrial publicity deprived Woods of his Sixth Amendment right to a fair trial, yet no one alleges that it amounted to contemptible conduct."

[44] The footnote stated: "We do not mean to imply that presumed prejudice can occur only when there is a combination of courtroom demonstrations and pretrial publicity."

> The record is clear that the officers were in the gallery for extended periods during the trial. The state has not contested any of the underlying facts upon which we rely. It, therefore, is clear that a remand for an evidentiary hearing would be a waste of judicial resources.

Woods v. Dugger, 923 F.2d at 1460 n.13. And the Court of Appeals concluded its opinion with the following observations:

> The record in this case is sufficient to demonstrate that the defendant was denied a fair trial.... We conclude that petitioner Woods has met the extremely high standard necessary for a successful claim of presumed prejudice.

Woods v. Dugger, 923 F.2d at 1460.

ARGUMENT IN RESPONSE

In light of the discussion presented above, the State's arguments in support of its petition for writ of certiorari do not overcome the propriety of the Eleventh Circuit's ruling and do not state a ground sufficient to warrant certiorari review. The Court of Appeals carefully considered and applied this Court's settled precedents. It did not overlook any of the few factual findings of the state courts and District Court. It fully addressed each of the arguments which the State presented. And it thoughtfully applied this Court's law to the undisputed facts and circumstances of this case.

This Court traditionally has not interfered with the decisions of Courts of Appeal which involve the application of settled principles of law to the facts and circumstances of a given case, recognizing that the lower federal courts are charged with the primary duty of resolving disputes in habeas corpus proceedings and, given the number of such cases reviewed by those courts, are in a better position than this Court to resolve such

disputes. Notwithstanding the Attorney General's hyperbole, no true questions of law are presented by the State's petition for writ of habeas corpus. Applying this Court's settled law to undisputed facts the Court of Appeals found that relief was warranted in this unique and extreme case. The Attorney General's petition expresses the State's displeasure at the Court of Appeals' ruling, but that displeasure surely does not support a grant of the State's certiorari petition. The State's specific arguments are addressed below.

(I)

THE COURT OF APPEALS' RULING WAS CONSISTENT WITH HOLBROOK V. FLYNN AND THIS COURT'S SETTLED PRECEDENTS

Contrary to the Attorney General's suggestion (see Petition for Writ of Certiorari, p. 12, hereinafter "Petition"), the Court of Appeals did not rely on the "mere presence" of uniformed spectators in granting relief. Rather, as the Court of Appeals carefully explained, it specifically applied the factors discussed by this Court in Holbrook v. Flynn and other relevant decisions (e.g., Estelle v. Williams; Estes v. Texas), to the "totality of the circumstances" of this case. See Woods, 923 F.2d at 1457 ("[W]e follow the command of the Supreme Court ... and examine the 'totality of the circumstances'.") The Court of Appeals fully considered all the circumstances shown by the "undisputed facts" of this case. Id. at 1457. As the Court itself stated: "[W]e evaluate the fairness of Woods' trial in light of both pretrial publicity and occurrences taking place during the trial." Id. The Court then examined the "totality of the circumstances" in detail at pages 1457-60 of its opinion.

The first question presented by the State is thus inconsistent with what the Court of Appeals did in this case. The State's supporting arguments are also inconsistent with the Court of Appeals' actual analysis, the positions of the parties below, and the circumstances of this case. These arguments are as follows:

a.) The State argues (Petition, pp. 12-13) that the Court of Appeals overlooked "actual prejudice." The Court of Appeals' analysis of the prejudice issue, however, demonstrates that the Court strictly adhered to this Court's analysis in Holbrook v. Flynn and carefully evaluated the issue of prejudice. The State itself stated before the Court of Appeals that "[t]here is no dispute that uniformed, armed correctional officers attended..." and that "even assuming the presence of these officers may be considered inherently prejudicial per se," Mr. Woods could not show "actual prejudice" (State's Brief, pp. 25, 27). Mr. Woods' submissions to the Court of Appeals discussed both inherent and actual prejudice and requested an evidentiary hearing on the latter -- the State opposed such a hearing in the state courts and District Court, and then before the Court of Appeals.

The State's petition to this Court does not relate what the Court of Appeals actually said on the issue of prejudice. On this issue, in accord with this Court's holdings in Holbrook v. Flynn, Estelle v. Williams, Irvin v. Dowd, and other settled precedents, the Court of Appeals said:

> In order for Woods to prevail on his claim of being denied a fair trial he must show either actual or inherent prejudice.

Woods, 923 F.2d at 1457, citing Holbrook v. Flynn and Irvin v. Dowd.

> The state claims that Holbrook v. Flynn requires the petitioner to prove both actual and inherent prejudice. The state points to the Court's statement that "if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over." Flynn, 475 U.S. at 572, 106 S.Ct. at 1347-48. We decline to follow the state's approach. First, such a reading would be a dramatic change in the law as initially set out in Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed. 2d 751 (1961), and we decline to infer such a sub silentio change. Second, such a reading makes little sense. If the petitioner can prove actual prejudice nothing is gained by making him also prove inherent prejudice. We also note that the Ninth Circuit has recently interpreted Flynn to allow the petitioner to prove either actual or inherent prejudice. See Norris v. Risley, 918 F.2d 828 (9th Cir. 1990).

Woods, 923 F.2d at 1457 n.3.

> The test for inherent prejudice is "not whether jurors actually articulated a consciousness of some prejudicial effect," but rather whether "an unacceptable risk is presented of impermissible factors coming into play." Holbrook v. Flynn, 475 U.S. at 570, 106 S.Ct. at 1346 (quoting Estelle v. Williams ...). This test requires us to examine two factors: first, whether there is an "impermissible factor coming into play" and second, whether it poses an "unacceptable risk."
>
> * * *
>
> We also must examine the record to determine if these impermissible factors posed an "unacceptable risk." The Williams Court held that a risk becomes unacceptable when there is a "probability of deleterious effects." Williams, 425 U.S. at 504, 96 S.Ct. at 1693. Should Woods be able to prove actual or inherent prejudice due to the presence of the uniformed prison guards then the state must justify their presence with an "essential state interest specific to [the] trial." Holbrook, 475 U.S. at 569, 106 S.Ct. at 1346.

Woods v. Dugger, 923 F.2d at 1457. The Court then undertook precisely such an examination of the "undisputed facts" and "totality of the circumstances" of this case. Id. at 1457-60.

The Court also explained:

> This Court has in the past noted that presumed prejudice rarely occurs and "is reserved for extreme situations." Bundy v. Dugger, 850 F.2d 1402 (11th Cir. 1988). The case at hand is one of those "extreme" cases. While the pretrial publicity may not be sufficient to rise to the level where we can presume prejudice to Mr. Woods, the publicity must be viewed in the context of the complete trial. Unlike the trial disputed in Bundy, Woods' trial was marred by the presence of uniformed spectators in the courtroom as well as by the pretrial publicity. Viewing the totality of the circumstances, we have no choice but to conclude that there was "an unacceptable risk [of] impermissible factors coming into play." Holbrook v. Flynn, 475 U.S. at 570, 106 S.Ct. at 1346.
>
> The officers in this case were there for one reason: they hoped to show solidarity with the killed correctional officer. In part, it appears that they wanted to communicate a message to the jury. The message of the officers is clear in light of the extensive pretrial publicity. The officers wanted a conviction followed by the imposition of the death penalty. The jury could not help but receive the message.

Woods, 923 F.2d at 1459-60 (footnote omitted).[45] And the Court concluded:

> The record in this case is sufficient to demonstrate

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[45] The Court also noted:

> The Supreme Court recently wrote that "[s]ome constitutional violations ... by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless".... We hold that harmless error analysis is inapplicable to a claim of a denial of a fair trial.

Woods, 923 F.2d at 1460, citing Satterwhite v. Texas, 486 U.S. 249, 256 (1988), and Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985). The Eleventh Circuit's holding in Coleman that the publicity and other circumstances involved in that case warranted relief and that traditional harmless error analysis did not apply to a claim of a fundamentally unfair trial has not been disturbed by this Court or any other Court. The Woods court also noted that the State's argument that the errors involved in Mr. Woods' fundamentally unfair trial were "harmless" was "foreclosed" by Coleman. Woods, 923 F.2d at 1460.

> that the defendant was denied a fair trial.... We conclude that Petitioner Woods has met the extremely high standard necessary for a successful claim of presumed prejudice.

Id. at 1460.

b.) The State devotes a substantial portion of its petition (Petition, pp. 14-19) to assertions that the Court of Appeals granted relief because this case "offended the sensibilities of the individual judges on the panel" (id. at 14) and, although not asserting that the officers were present to further "an essential state interest," see Holbrook, 475 U.S. at 569, 106 S.Ct. at 1346, to an argument that the officers had the right to be there.

As to the former assertion, the Eleventh Circuit's analysis squarely forecloses the State's hyperbole. The Court of Appeals cautiously and carefully applied the standards of Holbrook v. Flynn to the totality of the circumstances of this case. See subsection a, supra. Relief was by no means granted in this case because the "individual judges" were offended. Rather, in addressing the claim that the trial proceedings involved fundamental unfairness, the Court of Appeals noted that "presumed prejudice rarely occurs and 'is reserved for extreme situations'," Woods, 923 F.2d at 1459 (citations omitted), that the question required a careful examination of the "totality of circumstances," Woods, 923 F.2d at 1457, citing Sheppard v. Maxwell, that even after Mr. Woods proved prejudice the State could demonstrate that relief was not warranted by asserting an "essential state interest...," Woods, 923 F.2d at 1457, citing Holbrook, 475 U.S. at 569, 106 S.Ct. at 1346, that the State

"does not, and cannot" assert such an interest, Woods, 923 F.2d at 1460, and that "[v]iewing the totality of the circumstances, we have no choice but to conclude that there was an 'unacceptable risk [of] impermissible factors coming into play." Woods, 923 F.2d at 1459, citing and quoting Holbrook, 475 U.S. at 570, 106 S.Ct. at 1346.[46] "We conclude that petitioner Woods has met the extremely high standard necessary for a successful claim of presumed prejudice." Woods v. Dugger, 923 F.2d at 1460. The Court of Appeals' ruling was surely not based on the "sensibilities of the individual judges on the panel" (Petition, p. 14),[47] but on the "totality of circumstances" of this case which were analyzed with a careful application of this Court's settled precedents.

As to the State's latter assertion -- that the officers had the right to be there -- the State fails to even mention that:

> - Florida Department of Corrections rules expressly prohibited the actions which the officers took here. It is completely against Florida Department of Corrections regulations for correctional officers to appear in public, in uniform, in this manner. Department rules specifically provide that correctional officers' uniforms or any clothing "furnished by the Department [of Corrections] is not to be worn during off-duty hours or when the employee is not acting in an official capacity, except when traveling to and from work..." (Department of Corrections Rule 33-4.07; see

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[46] Consistent with the factfindings of the state courts and district court, the Eleventh Circuit also noted: "The officers in this case were there for one reason: they hoped to show solidarity with the killed officer.... The jury could not help but receive the message." Woods, 923 F.2d at 1459-60.

[47] Had it been, the full court surely would have taken action on rehearing en banc. Indeed, the Eleventh Circuit consistently undertakes en banc review of controversial decisions, and undertakes such review more often than most other Circuits.

also PCR 289-304 [Department of Corrections regulations]).

- The officers were not asked to be there by the trial court and were not there for security reasons. Indeed, the court had its own security personnel.

- The State did not assert any state interest before the District Court or Court of Appeals (and, indeed, has asserted no such interest in its current petition).

- As the Court of Appeals noted in Woods, 923 F.2d at 1459-60 (footnote omitted): "The officers in this case were there for one reason: they hoped to show solidarity with the killed correctional officer. In part, it appears that they wanted to communicate a message to the jury. The message of the officers is clear in light of the extensive pretrial publicity. The officers wanted a conviction followed by the imposition of the death penalty. The jury could not help but receive the message." Cf. Woods v. Dugger, District Court Order (The officers wanted to show support for the decedent and because they had an interest in the case).

As to the issue of prejudice, the Eleventh Circuit's analysis was as follows:

> The Supreme Court in Holbrook v. Flynn, held that after a showing of prejudice resulting from the presence of uniformed officers, the state may rebut the showing with a showing that the officers furthered an "essential state interest." 475 U.S. at 568-69, 106 S.Ct. at 1346. The state in the present case does not, and cannot, justify the presence of the uniformed corrections officers. The corrections officers were not present to escort any prisoners and they were not part of the courtroom security. Moreover, all testimony was concluded the day before oral arguments; therefore the officers were present on their own time and not as witnesses. Section III.C. of the Department of Corrections Policy and Procedure Directive regarding employees uniforms and clothing states that "the uniform ... is not to be worn during off-duty hours or when the employee is not acting in an official capacity, except when traveling to and from work." Under department rules, therefore, no state interest can justify the uniformed presence of these off-duty correctional officer.

Woods, 923 F.2d at 1460.

c.) The State additionally cites a number of cases in which relief was denied on the basis of claims that the trial proceedings were rendered fundamentally unfair (Petition, pp. 16-19). None of these cases involved the egregious, rare, and extreme circumstances in Mr. Woods' case. See Woods, 923 F.2d at 1457-60. Each, however, involved precisely what the Court of Appeals undertook here -- the application of Holbrook to the facts and "totality of the circumstances" of each petitioner's case. None are in conflict with the analysis of the Eleventh Circuit in Woods. Indeed, the fact that relief on the basis of Holbrook is rarely granted, and that cases such as Woods v. Dugger and Norris v. Risley are not common, speaks to the deference which the lower courts have given this Court's ruling that relief under Holbrook is to be reserved for the rare and extreme case. The "totality of the circumstances" here, as the Court of Appeals explained, established that this case is one of those "extreme cases," Woods, 923 F.2d at 1459, and that "Woods has met the extremely high standard necessary for a successful claim" under Holbrook. Woods, 923 F.2d at 1460. That this case is an "extreme" one, while others involving less severe circumstances are not, does not establish that there is any conflict among the lower courts.

Neither does the Attorney General's reference to cases from the Eleventh Circuit in which relief has been denied under Holbrook establish any conflict. If anything, the fact that the Eleventh Circuit Court of Appeals has rarely found under Holbrook that a petitioner's trial was rendered fundamentally unfair

speaks to the deference which the Eleventh Circuit itself accords the principle that such relief should be reserved for extreme situations. No conflict is shown by the fact that most cases do not meet Holbrook. This Court cautioned that few do. The Court of Appeals, with a cautious deference to this Court's standards, concluded that this case is one of those few.

(II)

THE COURT OF APPEALS' RULING WAS BASED ON THE RECORD, ON THE TOTALITY OF THE CIRCUMSTANCES WHICH THAT RECORD REFLECTED ABOUT THE PROCEEDINGS IN THIS CASE, AND WAS NOT BASED ON THE PRETRIAL PUBLICITY ALONE, WHILE THE STATE'S COMPLAINTS ARE INCONSISTENT WITH THE REVIEW WHICH THE COURT OF APPEALS UNDERTOOK, THE PARTIES' POSITIONS BELOW, AND THE RECORD

The second question which the State attempts to present and the collection of arguments underlying it stray far afield from the Court of Appeals' resolution in this case. The Attorney General provides a handful of inaccurate assertions about what the Eleventh Circuit did, and then proceeds to discuss each. An analysis of what the Eleventh Circuit actually did defeats the State's argument.

a.) The State suggests in this subargument, in contradiction of its earlier arguments, that the Eleventh Circuit granted relief solely because of the pretrial publicity (Petition, pp. 24-29). Although discussing the adverse pretrial publicity and the hostile atmosphere in the community, the Eleventh Circuit's analysis, based on the standards of Holbrook v. Flynn, Estelle v. Williams, and Estes v. Texas, was based on the "totality of the circumstances," Woods, 923 F.2d at 1459, with a particular focus on what transpired during the trial

proceedings. As the Court of Appeals plainly stated:

> This Court has in the past noted that presumed prejudice rarely occurs and "is reserved for extreme situations." Bundy v. Dugger, 850 F.2d 1402 (11th Cir. 1988). The case at hand is one of those "extreme" cases. While the pretrial publicity may not be sufficient to rise to the level where we can presume prejudice to Mr. Woods, the publicity must be viewed in the context of the complete trial. Unlike the trial disputed in Bundy, Woods' trial was marred by the presence of uniformed spectators in the courtroom as well as by the pretrial publicity....

Woods, 923 F.2d at 1459.

b.) The State also asserts that the Court of Appeals acted like a "roving commission of inquiry" and relied on "extra-record facts." Mr. Woods, however, presented with his petition facts relating to each of the matters on which the Court of Appeals relied. The facts were never contested by the State before the District Court or Court of Appeals and these facts were credited by each court. Mr. Woods specifically discussed the fact that Union County, Florida, is a small, rural county -- indeed, these facts had been found by the Florida Supreme Court and District Court. The Court of Appeals' citations to newspaper articles and the Florida Statistical Abstract in support of these undisputed facts surely does not mean that the Court acted like a "roving commission of inquiry." The Florida Supreme Court on direct appeal and the District Court each believed that there was a hostile community atmosphere[48] (Justice Shaw in fact eloquently discussed these facts in detail in his dissent from the denial of

[48] No one has ever disputed, for example, that the sentiment was so hostile that three petitions, one containing 5,000 signatures, had been passed around this small community. The petitions demanded a conviction and death sentence in this case and greater protection for prison guards.

relief on direct appeal); Mr. Woods pled these facts, making numerous references to the hostile community sentiment; and the State never contested them before the state courts, District Court, or Court of Appeals. The State's belated attempt now to chastise the Eleventh Circuit for citing newspaper articles and other publications highlighting facts which neither the courts nor the parties previously disputed does not warrant the granting of its certiorari petition.[49] And, as previously stated, the Eleventh Circuit did not grant relief only because this trial was conducted in the small, rural courthouse of a small, rural county in the midst of hostile community sentiment; it required Mr. Woods to prove more, and granted relief pursuant to Holbrook because of the totality of the circumstances and what transpired at this trial.

c.) The State further asserts that the Court of Appeals ignored the factfindings of the state courts and District Court. The State did not disagree below that there are two such factfindings relating to this issue: 1) that Union County is a small, rural county and 2) that the officers (who the District Court and Florida Supreme Court, as well as the Eleventh Circuit, all agreed were present throughout the proceedings) were present to show solidarity with the decedent and because they had an interest. Each of these findings was expressly credited and relied upon by the Court of Appeals. See Woods v. Dugger, 923 F.2d at 1457-58 (as to number 1), and Woods v. Dugger, 923 F.2d

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[49] The State's petition never mentions that Mr. Woods presented much independent documentation in support of the claim before the lower courts.

at 1459-60 (as to number 2).

d.) The State additionally asserts that "[i]f the record was at all undeveloped ... the court of appeals should have remanded for an evidentiary hearing" (Petition, p. 28), an assertion which is particularly puzzling in light of the facts that:

- Mr. Woods expressly requested while the State vehemently opposed an evidentiary hearing before the state courts, District Court, and Court of Appeals.

- The State did not contest any of the facts presented by Mr. Woods in support of the claim before the state courts, District Court, and Court of Appeals.

- The State in the Court of Appeals virtually agreed that "the presence of these officers may be considered inherently prejudicial per se" (State's Brief, p. 27).

- The Court of Appeals followed the rulings of this Court in Holbrook v. Flynn, Estelle v. Williams, and Estes v. Texas in concluding that since inherent prejudice had been shown there was no need to conduct a further hearing on prejudice. See Woods, 923 F.2d at 1457 n.3.

As the Court of Appeals stated:

> The record is clear that the officers were in the gallery for extended periods during the trial. The state has not contested any of the underlying facts upon which we rely. It, therefore, is clear that a remand for an evidentiary hearing would be a waste of judicial resources.

Woods v. Dugger, 923 F.2d at 1460 n.13.

e.) Finally, although the voir dire responses of the jurors came before the trial proceedings and thus before the correctional officers' actions had their most disturbing effects, the State argues that many of the prospective jurors "stated that they could be impartial" (Petition, p. 29). This Court, in Holbrook itself, foreclosed such an argument:

> The Court of Appeals was correct to find that Justice Giannini's assessment of jurors' states of mind cannot be dispositive here. If "a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process," little stock need be placed in jurors' claims to the contrary. Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. This will be especially true when jurors are questioned at the very beginning of proceedings; at that point, they can only speculate on how they will feel after being exposed to a practice daily over the course of a long trial. Whenever a courtroom arrangement is challenged as inherently prejudicial, therefore, the question must be not whether jurors actually articulated but rather whether "an unacceptable risk is presented of impermissible factors coming into play" ...

Holbrook, 106 S.Ct. at 1346-47, citing Estes v. Texas, Sheppard v. Maxwell, Irvin v. Dowd, 366 U.S. 717 (1961), and Estelle v. Williams, 425 U.S. 501 (1976).

CONCLUSION

Before the Court of Appeals the State's only arguments were,

> (1) most of the officers in the gallery were witnesses who testified in uniform at trial, (2) the officers were present only during closing arguments.

Woods, 923 F.2d at 1459. Each argument was inconsistent with the findings of the state courts and District Court and with the record.[50] The Court of Appeals relied on and discussed the record facts supporting those findings, record facts which rebutted each of the State's arguments. The Court of Appeals also noted, "[t]he state in the present case does not, and

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[50] The District Court and state courts agreed that approximately forty-five officers were present throughout the proceedings while the record reflects that no more than 14 officers had testified at the trial, a trial at which the rule of sequestration had been imposed as to witnesses. See Woods, 923 F.2d at 1459.

cannot, justify the presence of the uniformed corrections officers." Woods, 923 F.2d at 1460.

Displeased with the fact that its arguments were unsuccessful before the Court of Appeals, the State's petition in this Court employs a heavy hand in castigating the Court of Appeals for its ruling. The State's displeasure does not warrant the relief the State seeks and the State's petition should be denied.

Respectfully submitted,

BHN

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RENEWED BHN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Richard Martell, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Drive, Tallahassee, Florida 32301, this ~~25th~~ 9th day BHN of ~~September~~ October, 1991. BHN

BHN

Attorney

Georgia Supreme Court would rule that the body of existing decisions have extended the law of competitive restraint to its constitutional limits and invalidate the legislature's recent foray outside its boundary of permissible constitutional action.

Under any of the foregoing analyses of the law, Associated Materials is unable to demonstrate a likelihood of success on the merits in this case. Accordingly, I would reverse the decision of the district court.

Ronald WOODS, Petitioner-Appellant,

v.

Richard L. DUGGER, Respondent-Appellee.

No. 89-3420.

United States Court of Appeals, Eleventh Circuit.

Feb. 5, 1991.

Petitioner, whose first-degree murder conviction and death sentence were affirmed by the Florida Supreme Court, 490 So.2d 24, filed petition for habeas corpus relief. The United States District Court for the Middle District of Florida, 711 F.Supp. 586, No. 88-00910-CIV J-14, Sam H. Black, Chief Judge, originally granted petition in part, but, after remand for resentencing resulting in another death sentence, denied petition. Petitioner appealed. The Court of Appeals, Johnson, Circuit Judge, held that hostile atmosphere in small rural community in which petitioner's trial took place, for killing of prison guard, and number of prison guards who attended trial in full uniform deprived defendant of fair trial.

Reversed and remanded with instructions.

1. Criminal Law ⇐633(1), 659

Hostile atmosphere in small rural community in which defendant's capital murder trial took place, for killing of prison guard, and number of prison guards who attended trial in full uniform rose to level of "inherent prejudice," thereby depriving defendant of fair trial; one third of county population of 10,000 were prisoners, 23% of county residents employed outside home worked within prison system, about half of the more than 40 spectators visible in photographs taken during trial appeared to be wearing prison guard uniforms, and officers were not present to escort prisoners, as part of courtroom security, or as witnesses. U.S.C.A. Const.Amend. 6.

See publication Words and Phrases for other judicial constructions and definitions.

2. Constitutional Law ⇐268(1)

Due process requires courts to safeguard against intrusion of factors into trial process that tend to subvert its purpose, and courts must specifically guard against atmosphere in and around courtroom becoming so hostile as to interfere with trial process, even though all forms of trial conform to requirements of law. U.S.C.A. Const.Amends. 5, 14.

3. Criminal Law ⇐633(1), 637

In order for defendant to prevail on claim of being denied fair trial as a result of various incidents harming trial process, such as security precautions or pretrial publicity, defendant must show either actual or inherent prejudice. U.S.C.A. Const. Amend. 5.

4. Criminal Law ⇐633(1)

Sixth Amendment imposes obligation upon trial court to minimize any risk of unacceptable factors affecting defendant's right to fair trial, which obligation is distinct from trial court authority derived from state statutes or from its inherent contempt power. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐1169.2

Harmless error analysis is inapplicable to claim of denial of fair trial. U.S.C.A. Const.Amend. 6.

Billy H. Nolas, Larry H. Spalding, Office of the Capital Collateral Representative, Tallahassee, Fla., for petitioner-appellant.

Gary L. Printz, Richard B. Martell, Dept. of Legal Affairs, Tallahassee, Fla., for respondent-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before KRAVITCH, JOHNSON and CLARK, Circuit Judges.

JOHNSON, Circuit Judge:

This case is an appeal from the district court's denial of Ronald Woods' petition for a writ of habeas corpus.

I. FACTUAL BACKGROUND

This case arose out of a disturbance at the Union Correctional Institution in Union County, Florida on May 5, 1983. Woods and his co-defendant, Leonard Bean, attacked a number of correctional officers at the prison, including John Dennard. Woods, who was eighteen at the time, stabbed and killed Dennard.

Trial

On June 7, 1983, Woods and Bean were indicted for first degree murder. The joint trial began on September 26, 1983. On September 30, 1983, the jury returned guilty verdicts against both Woods and Bean.[1] On October 1, 1983, the trial court conducted an advisory sentencing proceeding. Woods presented the testimony of a court appointed psychologist, Dr. Harry Kropp, that Woods had an I.Q. of 69 which placed him in the mild range of mental retardation. The jury voted seven to five that Woods should receive the death penalty.

The trial court then sentenced Woods to death. The judge found two statutory aggravating circumstances: Woods committed the murder while incarcerated, and the crime impeded the operation of the correctional system. *See* Fla.Stat.Ann. § 921.141(5)(a) and (g). The trial judge found one statutory mitigating circumstance: Woods' age. *See id.* at (6)(g). The judge rejected Woods' argument that Woods did not have the mental capacity to appreciate the criminality of his conduct or to restrict his actions to the requirements of law. *See id.* at (6)(f).

Appeals and Collateral Attacks

Woods appealed his conviction and sentence directly to the Florida Supreme Court, which affirmed the trial court. *Woods v. State*, 490 So.2d 24 (Fla.1986). On November 10, 1986, the United States Supreme Court denied certiorari in the direct appeal. *Woods v. Florida*, 479 U.S. 954, 107 S.Ct. 446, 93 L.Ed.2d 394 (1986). On October 5, 1987, the Governor of Florida signed a death warrant to be carried out on December 10, 1987.

On November 6, 1987, Woods filed a motion in the trial court for post-conviction relief pursuant to Fla.R.Crim.P. 3.850. The trial court denied the motion on December 1, 1987. On December 9, 1987, the Florida Supreme Court stayed the execution of the death warrant. On July 14, 1988, however, the court affirmed the lower court and dissolved the stay. On October 17, 1988, the Governor signed a second death warrant, scheduling execution for the week of November 10, 1988. *Woods v. State*, 531 So.2d 79 (Fla.1988).

Woods filed the present action, his first federal habeas corpus petition, on November 2, 1988.[2] The district court stayed execution of the death warrant in order to consider the petition and allow an appeal to

1. The jury convicted Woods on all five counts. Bean was sentenced to life imprisonment.

2. The petition presents 13 claims for relief:
(1) that the trial court's failure to remove the large number of uniformed correctional officers from the courtroom violated the Sixth, Eighth, and Fourteenth Amendments;
(2) that the exclusion of black jurors violated the Eighth and Fourteenth Amendments;
(3) that the trial court's refusal to continue the case violated the Sixth, Eighth, and Fourteenth Amendments;
(4) that the trial court's refusal to continue the case in order to allow a pre-penalty-phase investigation and trial counsel's failure to discover crucial mitigating evidence violated the Sixth, Eighth, and Fourteenth Amendments and Woods's right to a competent mental health evaluation under the Fourteenth Amendment;
(5) that execution of an eighteen-year-old with the mental age of a twelve-year-old violates the Eighth Amendment;
(6) that the trial court erred in instructing the jury that it must consider Woods's mental problems as aggravating circumstances;
(7) that the trial transcript was unreliable, violating the Sixth, Eighth, and Fourteenth Amendments;
(8) that the trial court failed to consider Woods's mental deficiencies as non-statutory

this Court. The district court denied Woods' request for an evidentiary hearing on the petition, but on December 20, 1988, held oral argument. The district court rejected all of Woods' claims, except the claim that the trial court failed to consider nonstatutory mitigating evidence in violation of *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1986). The district court granted the petition on the *Hitchcock* claim, ordering the trial court to resentence Woods within 180 days and to take into account all mitigating evidence as well as the jury's recommendation of death. 711 F.Supp. 586.

Both Woods and the state appealed to this Court. The state, however, did not seek a stay of the district court's order pending appeal. Instead, the state arranged for the trial court to resentence Woods on April 23, 1989. The trial court considered evidence dating back to the crime and evidence that had come to light after the prior sentence. Finding that the two statutory aggravating circumstances (crime committed while in prison, and crime inhibiting operation of prison) outweighed the one statutory mitigating circumstance (youth) and the nonstatutory mitigating circumstances, the trial court again sentenced Woods to death. This Court then dismissed the state's cross-appeal as moot in light of the new sentence.

On May 24, 1990, the state filed a motion with this Court to relinquish jurisdiction so that the district court could amend its judgment under Fed.R.Civ.P. 60(b) in order to take into account the new sentence. The Court granted the motion on June 5, 1990. On July 13, 1990, the district court amended its prior judgment and denied Woods' petition on all claims. This appeal is from that judgment.

mitigating circumstances in violation of the Sixth, Eighth, and Fourteenth Amendments;
(9) that the prosecution improperly urged the jury and the trial judge to consider the victim's close relationship with the prosecutor and the trial judge;
(10) that the prosecutor's references to Woods's decision not to present evidence violated the Fifth, Sixth, Eighth, and Fourteenth Amendments;
(11) that the trial court improperly lessened the jury's sense of responsibility during the penalty phase of the trial, violating the Eighth and Fourteenth Amendments;
(12) that trial counsel was incompetent in failing to argue for severance on the ground that Bean's lawyer had a conflict of interest;
(13) that the trial court improperly considered Woods's juvenile offenses and prison disciplinary reports as aggravating circumstances in violation of the Sixth, Eighth, and Fourteenth Amendments.
Woods v. Dugger, 711 F.Supp. 586, 591-92 n. 8 (M.D.Fla.1989).

II. ANALYSIS

[1] In this appeal, Woods alleges that he was denied a fair trial due to the hostile atmosphere in the small rural community in which the trial took place and to the number of prison guards who attended the trial in full uniform. In this case we face a situation which was foreshadowed by dictum from the Supreme Court in *Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986). The *Holbrook* Court held that some courtroom security did not violate the defendant's Sixth Amendment right to receive a fair trial. However, the Court wrote, "[w]e do not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial." *Id.* at 570, 106 S.Ct. at 1346.

[2] The due process clause of the Fourteenth Amendment guarantees the right of state criminal defendants to be tried by an impartial jury. The Fourteenth Amendment incorporates the essence of the Sixth Amendment right to be tried "by a panel of impartial, 'indifferent' jurors [whose] verdict must be based upon the evidence developed at the trial." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961) (citations omitted). As Chief Justice Warren noted in his concurrence in *Estes v. Texas*, 381 U.S. 532, 552, 85 S.Ct. 1628, 1637, 14 L.Ed.2d 543 (1965) (Warren, C.J., concurring) due process requires the courts to safeguard against "the intrusion of factors into the trial process that tend to subvert its purpose." *Id.* at 560, 85 S.Ct. at 1641. Specifically, the courts must guard against "the atmosphere in and around the courtroom [becoming] so hostile as to interfere with the trial process, even though ... all the forms of trial conformed

oods alleges that due to the hostile rural community place and to the who attended the his case we face a shadowed by dic- ourt in *Holbrook* 06 S.Ct. 1340, 89 *Holbrook* Court security did not ixth Amendment l. However, the ot minimize the uniformed and ose to a defen- g a fair trial." 346.

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There have Court, as well where criminal issue of being various inciden cess" of which in *Estes v. Tex* 1641. While s cused on questi during the tri *Flynn*, 475 U.S *ledge v. Dugger modified in pa* Cir.1987), and ot pretrial publicit *Maxwell*, 384 U L.Ed.2d 600 (196 F.2d 1487 (11th artificially divide rate lines of an the command o *Sheppard v. Ma* tality of circum U.S. at 352, 86 we evaluate the light of both pr rences taking pl

[3] In order f claim of being d show either actu *Holbrook v. Flyn* 1340, 89 L.Ed.2d 366 U.S. 717, 81 (1961). The test "not whether jur consciousness of but rather whethe presented of imp into play.'" *Hol* at 570, 106 S.Ct. a *Williams*, 425 U.

3. The state claims quires the petition inherent prejudice Court's statement tice is not found the defendant fails inquiry is over." S.Ct. at 1347–48. state's approach. F a dramatic change in *Irvin v. Dowd*, 3 L.Ed.2d 751 (1961),

501, 89 L.Ed.2d at 1642.

There have been several cases in this Court, as well as in the Supreme Court, where criminal defendants have raised the issue of being denied a fair trial due to various incidents harming the "trial process" of which Chief Justice Warren spoke in *Estes v. Texas*. *Id.* at 560, 85 S.Ct. at 1641. While some of the cases have focused on questionable security precautions during the trial, *see, e.g., Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340; *Elledge v. Dugger*, 823 F.2d 1439 (11th Cir.), *modified in part by* 833 F.2d 250 (11th Cir.1987), and other cases have focused on pretrial publicity, *see, e.g., Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); *Coleman v. Kemp*, 778 F.2d 1487 (11th Cir.1985), we decline to artificially divide these cases into two separate lines of analysis. Instead we follow the command of the Supreme Court in *Sheppard v. Maxwell* and examine the "totality of circumstances," *Sheppard*, 384 U.S. at 352, 86 S.Ct. at 1517. Therefore, we evaluate the fairness of Woods' trial in light of both pretrial publicity and occurrences taking place during the trial.

[3] In order for Woods to prevail on his claim of being denied a fair trial he must show either actual or inherent prejudice.[3] *Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed 2d 525 (1986); *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). The test for inherent prejudice is "not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play.'" *Holbrook v. Flynn*, 475 U.S. at 570, 106 S.Ct. at 1346 (quoting *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976)). Woods alleges that due to the hostile rural community in which the trial took place and to the number of prison guards who attended the trial in full uniform. In this case we face a situation which was foreshadowed by dictum from the Supreme Court in *Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986). The *Holbrook* Court held that some courtroom security did not violate the defendant's Sixth Amendment right to receive a fair trial. However, the Court wrote, "[w]e do not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial." *Id.* at 570, 106 S.Ct. at 1346.

Turning to the record, we note that the trial was held in Union County, Florida. Union County is a small rural county in Northern Florida. Just over ten thousand people live in Union County, but one-third of those are prisoners. Tate Rose, *What Life is Like in a Place Where Half the Residents are Behind Bars*, Chicago Tribune, October 21, 1985, at Tempo Sect. p. 1, col. C. In the neighboring counties of Bradford and Union there are four state

to exam two factors: first, whether there is an "impermissible factor coming into play" and second, whether it poses an "unacceptable risk." The Ninth Circuit has found one example of an impermissible factor. In *Norris v. Risley*, 918 F.2d 828 (9th Cir.1990), the court determined that spectators at a kidnapping and rape trial who were wearing buttons inscribed with the words "women against rape" posed an impermissible factor, "[b]ecause the buttons ... conveyed an implied message [of guilt], and because the buttons were not subject to the constitutional safeguards of confrontation and cross examination, they are clearly the sort of 'impermissible factors' that courts must ensure receive no weight." *Id.* at 830.

We also must examine the record to determine if these impermissible factors posed an "unacceptable risk." The *Williams* Court held that a risk becomes unacceptable when there is a "probability of deleterious effects." *Williams*, 425 U.S. at 504, 96 S.Ct. at 1693. Should Woods be able to prove actual or inherent prejudice due to the presence of the uniformed prison guards then the state must justify their presence with an "essential state interest specific to [the] trial." *Holbrook*, 475 U.S. at 569, 106 S.Ct. at 1346.[4]

3. The state claims that *Holbrook v. Flynn* requires the petitioner to prove both actual and inherent prejudice. The state points to the Court's statement that "if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over." *Flynn*, 475 U.S. at 572, 106 S.Ct. at 1347–48. We decline to follow the state's approach. First, such a reading would be a dramatic change in the law as initially set out in *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), and we decline to infer such a *sub silentio* change. Second, such a reading makes little sense. If the petitioner can prove actual prejudice nothing is gained by making him also prove inherent prejudice. We also note that the Ninth Circuit has recently interpreted *Flynn* to allow the petitioner to prove either actual or inherent prejudice. *See Norris v. Risley*, 918 F.2d 828 (9th Cir.1990).

4. There is no similar justification which would rebut allegations of pretrial publicity. *See Sheppard v. Maxwell*, *supra*.

prisons which employ twenty-two hundred workers, and the prisons are responsible for $71 million of the local economy. Stuart, *A Town's Fact of Life: The Death Row Prison*, New York Times, April 6, 1984 at Sect. A, p. 14, col. 1. The Florida Statistical Abstract also reports that Union County is one hundred percent rural, *Florida Statistical Abstract* 3 n. 2, 13 (Shermyen, ed. 1989), and that thirty-two hundred people are employed outside of the home. *Id.* at 171.

The jury was drawn exclusively from Union County. Richard Dugger, the State Secretary of Corrections, told the *New York Times*, in a reference to the town of Starke in neighboring Bradford County, "The only time the community takes note of what's going on at the prison ... is when a guard is killed." Nordheimer, "Town Pays Little Mind to Executions," *New York Times*, Sept. 8, 1984, at Sect. 1, p. 6, col. 3.

Union County took note of the murder of Corrections Officer Dennard. Prior to his death, he was interviewed by the *St. Petersburg Times*. He told the paper that the Union Correctional Institution was dangerously understaffed and that he wanted to be transferred because he feared for his safety as a prison guard. Officer Dennard's death became a focal point for the lobbying efforts of a group called the United Correctional Employees in their demands for the government to hire more correctional officers. *United Press International*, June 23, 1983. After Officer Dennard's death, his sister began a petition that she reported was "going like hot cakes" and had gathered hundreds of signatures. *United Press International*, May 28, 1983. By the time of Mr. Woods' trial, defense counsel told the court that the petition had 5,000 signatures, not all of which, however, were from Union County residents. The petition stated "its [sic] time we started punishing the guilty and protecting the innocent" and demanded the death penalty for those who kill prison guards. *Id.*

The effect of the killing on this community is evidenced in the answers obtained on voir dire.[5] Of the forty-one potential jurors excused either peremptorily or for cause, six immediately excused themselves. Consequently, the record reveals no information about these six. Of the remaining thirty-five potential jurors who were eventually excused: thirty-three had relatives or close friends who worked in the prison, or the jurors had worked in the prison themselves; twenty-one of the excused jurors had heard of the case; nine knew a witness; and one was a witness who was not called by either side. Within the actual jury: four jurors and one alternate juror neither had heard of the case nor had any relatives working in the prison system; four jurors had not heard of the case, but had either worked in the prison system themselves or had relatives currently working in the system; three jurors and one alternate juror both had heard of the case and had relatives currently working in the system; and, finally, one juror had heard of the case but had no relatives or friends working in the system.[6]

In addition, the gallery of the courtroom was filled with spectators. The defense counsel raised several objections to the presence of prison guards in the gallery, and the court ordered a videotape and photographs taken of the gallery. The photos reveal that the gallery had four rows which could each seat about ten or eleven people. Virtually every seat was occupied, and several people were standing in the back of the courtroom. About half of the spectators appear to be wearing prison guard uniforms.[7]

The state attempts to downplay the significance of the spectators in two ways.

5. First, it should be noted that current prison employees were excluded from the potential venire.

6. As a side note, an example of how small the county was, the jury contained one juror who was the mother of another juror and a juror who knew the husband of another juror.

7. Woods also alleges, and the state has not denied, that there was excessive security utilized as a show of force at the trial. Woods claims

The state argues:
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The state's first argument is not factually supported. The state is correct in noting that fourteen corrections officers testified at trial. And, the state is correct in that the trial court noted just before closing argument that "many of the uniformed persons in the courtroom, that I have observed, are persons who testified in their uniform during the course of the trial." The court's comment can be true only about the gallery during closing arguments. We must infer from the record that there was a substantial number of non-witnesses present in uniform prior to closing arguments because at the close of evidence, the day before closing argument, the defendant moved for a mistrial on the basis of the large number of officers in the audience. At this point, none of the witnesses were present in the gallery because the rule of sequestration had been invoked at the start of the trial and the state explicitly maintained the rule for all its witnesses up until closing arguments. Moreover, the fact that the witnesses testified in uniform at trial[8] does not lessen the prejudice of their showing up in uniform to hear closing arguments at a later time.[9] The prejudice does not depend on whether the uniformed guards were witnesses or not. The prejudice arises from the presence of the uniformed corrections officers in the context of a trial being held in the midst of an angry community.

The state makes the additional claim that the audience was present only during closing arguments. By examining the record, it is clear that uniformed guards were present in the gallery at the very least during voir dire, closing argument, and throughout the sentencing phase of the trial. The record is replete during those portions of the trial with the trial judge's comments to the spectators telling them when the trial will resume following breaks and requesting them to be in their seats before the jury returns. The trial judge also at times admonished the crowd to remain quiet and not make audible responses. Furthermore, the judge told the spectators to go to the lobby while the jury deliberated during the guilt phase. The record also reflects that spectators, including the uniformed guards, were present during the trial, despite the lack of admonitions from the bench, because the closing arguments were not made until Friday morning, yet the defense counsel made their objection and moved for a mistrial at the close of all the evidence on Thursday evening.

This Court has in the past noted that presumed prejudice rarely occurs and "is reserved for extreme situations." *Bundy v. Dugger*, 850 F.2d 1402 (11th Cir.1988). The case at hand is one of those "extreme" cases. While the pretrial publicity may not be sufficient to rise to the level where we can presume prejudice to Mr. Woods, the publicity must be viewed in the context of the complete trial. Unlike the trial disputed in *Bundy*, Woods' trial was marred by the presence of uniformed spectators in the courtroom as well as by the pretrial publicity. Viewing the totality of the circumstances, we have no choice but to conclude that there was "an unacceptable risk [of] impermissible factors coming into play." *Holbrook v. Flynn*, 475 U.S. at 570, 106 S.Ct. at 1346.

The officers in this case were there for one reason: they hoped to show solidarity with the killed correctional officer. In part, it appears that they wanted to communicate a message to the jury.[10] The

that there were guards with shotguns on the courthouse roof, on the courthouse steps and in the courthouse lobby. Woods claims that the jurors had to walk through this fortress-like atmosphere every day. While these allegations may or may not be true, we do not rely on them to reach our conclusion.

8. Evidence was taken only on Tuesday, Wednesday, and Thursday.

9. Closing arguments were heard on Friday.

10. It is a mistake, however, to weigh the First Amendment speech rights of the officers against the Sixth Amendment rights of Mr. Woods, for that case is not before this Court. We express no opinion on whether the trial court may muzzle the free speech of the officers. We only hold that if the officers choose to speak in the manner that they chose—the Sixth Amendment rights of Mr. Woods are violated.

message of the officers is clear in light of the extensive pretrial publicity. The officers wanted a conviction followed by the imposition of the death penalty. The jury could not help but receive the message.

[4] It is the purpose of the Sixth Amendment to guarantee the defendant a fair trial in which the jury reaches its verdict based only on the evidence subjected to the crucible of the adversarial process.[11] While this Court realizes that no trial can be perfect, some errors so prejudice the process that reviewing courts are unable to conclude that the verdict was based only on the evidence presented. Faced with such an error, we hold that the record demonstrates that the pretrial publicity combined with the large number of uniformed spectators rose to the level of inherent prejudice, thereby depriving the petitioner of a fair trial.[12]

The Supreme Court in *Holbrook v. Flynn* held that after a showing of prejudice resulting from the presence of uniformed officers, the state may rebut the showing with a showing that the officers furthered an "essential state interest." 475 U.S. at 568–69, 106 S.Ct. at 1346. The state in the present case does not, and cannot, justify the presence of the uniformed corrections officers. The corrections officers were not present to escort any prisoners and they were not part of the courtroom security. Moreover, all testimony was concluded the day before oral arguments; therefore the officers were present on their own time and not as witnesses. Section III.C. of the Department of Corrections Policy and Procedure Directive regarding employees uniforms and clothing states that "the uniform ... is not to be worn during off-duty hours or when the employee is not acting in an official capacity, except when traveling to and from work." Under department rules, therefore, no state interest can justify the uniformed presence of these off-duty correctional officers.

[5] The state, however, argues that the evidence of guilt is so overwhelming that any error was harmless. This argument was foreclosed by this Court's holding in *Coleman v. Kemp*, 778 F.2d at 1541 in which we held that a denial of a fair trial can never be harmless because the right is so fundamental to our notion of due process. The Supreme Court recently wrote that "[s]ome constitutional violations ... by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless." *Satterwhite v. Texas*, 486 U.S. 249, 256, 108 S.Ct. 1792, 1797, 100 L.Ed.2d 284 (1988). We hold that harmless error analysis is inapplicable to a claim of a denial of a fair trial.

III. CONCLUSION

The petitioner also raises an ineffective assistance of counsel claim and an erroneous denial of a continuance claim, both of which appear to merit evidentiary hearings in the district court. However, in order to avoid issuing an advisory opinion we will not reach these questions. The record in this case is sufficient to demonstrate that the defendant was denied a fair trial. There is no need for an evidentiary hearing in the district court on this claim.[13] We conclude that petitioner Woods has met the extremely high standard necessary for a successful claim of presumed prejudice.

11. The Sixth Amendment imposes an obligation upon trial courts to minimize any risk of "unacceptable factors" affecting the accused's right to have a fair trial. This obligation is clearly distinct from any trial court authority that is derived from state statutes, *see, e.g., Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965), or from the courts' inherent contempt power. *See, e.g., In Re Little*, 404 U.S. 553, 92 S.Ct. 659, 30 L.Ed.2d 708 (1972) (per curiam). As should be clear from the facts of this case, the actions of the spectators and the effect of the pretrial publicity deprived Woods of his Sixth Amendment right to a fair trial, yet no one alleges that it amounted to contemptible conduct.

12. We do not mean to imply that presumed prejudice can occur only when there is a combination of courtroom demonstrations and pretrial publicity.

13. The record is clear that the officers were in the gallery for extended periods during the trial. The state has not contested any of the underlying facts upon which we rely. It, therefore, is clear that a remand for an evidentiary hearing would be a waste of judicial resources.

We therefore REVERSE the decision of the district court and REMAND the case to the district court with instructions to issue the writ of habeas corpus conditioned on the state's right to retry the petitioner within a reasonable time.[14]

Joseph P. CONNORS, Sr., Donald E. Pierce, Jr., William Miller, William B. Jordan, and Paul R. Dean, as Trustees of the United Mine Workers of America 1950 Pension Plan, and 1974 Pension Plan, Plaintiffs–Appellees,

v.

RYAN'S COAL COMPANY, INC., a corporation; Alan's Coal Sales, a partnership; Simmons Equipment Co., Inc., a corp.; Simmons Machinery, Inc., a corporation; Berry Mountain Mining Co., Inc., a corp.; George M. Simmons, an individual; and George Alan Simmons, an individual, Defendants,

Janice Simmons, an individual, Defendant–Appellant.

No. 89-7046.

United States Court of Appeals, Eleventh Circuit.

Feb. 6, 1991.

Appeal was taken from order of the United States District Court for the Northern District of Alabama, No. CV–87–H–0057–S, James Hughes Hancock, J., which imposed withdrawal liability under the Multiemployer Pension Plan Amendments Act (MPPAA). The Court of Appeals, Edward S. Smith, Senior Circuit Judge, sitting by designation, held that: (1) there was no right to jury trial under the MPPAA; (2) lack of jury trial did not violate the Seventh Amendment; and (3) evidence sustained finding of partnership relationship to defaulting signatory employer.

Affirme

Clark, Circuit Judge, dissented and filed an opinion.

1. Jury ⇐17(1)

Although district court review of arbitration decision is available under the provisions of the Multiemployer Pension Plan Amendments Act (MPPAA), de novo trial with a jury is not available. Employee Retirement Income Security Act of 1974, § 4221(a)(1), as amended, 29 U.S.C.A. § 1401(a)(1).

2. Jury ⇐12(1.1)

When Congress creates new cause of action and remedies unknown to the common law, it may vest fact-finding in a tribunal other than a jury, free from the strictures of the Seventh Amendment. U.S.C.A. Const.Amend. 7.

3. Jury ⇐14(1.4)

Trustees' cause of action under the enforcement provisions of the Multiemployer Pension Plan Amendments Act (MPPAA) did not exist at the common law, so that arbitration provisions of the Act do not unconstitutionally deprive parties of right to a jury trial. U.S.C.A. Const. Amend. 7.; Employee Retirement Income Security Act of 1974, § 4221(a)(1), as amended, 29 U.S.C.A. § 1401(a)(1).

4. Federal Courts ⇐843, 854

Clearly erroneous standard applies even when district court's fact-findings rest on documentary evidence or inferences from other facts.

5. Federal Courts ⇐421

While court may look to state law for guidance in determining whether party against whom withdrawal liability is sought to be imposed under the Multiemployer Pension Plan Amendments Act (MPPAA) is a partner of a defaulting signatory employer, question of whether business relationship qualifies as a "partnership" is ultimately one of federal law. Em-

14. This Court notes that a resentencing hearing was held on April 23, 1989. The record of this hearing reflects that the gallery of the courthouse was once again filled with a large group of uniformed corrections officers. A change of venue would eliminate or at least minimize this problem.

of death, and remand this case for a new sentencing proceeding before a judge and jury.

SHAW and BARKETT, JJ., concur.



Ronald WOODS, Appellant,

v.

STATE of Florida, Appellee.

No. 71523.

Supreme Court of Florida.

July 14, 1988.

Rehearing Denied Oct. 12, 1988.

Defendant appealed from order of the Circuit Court, Union County, Stephan P. Mickle, J., denying his motion for postconviction relief. The Supreme Court held that: (1) holding evidentiary hearing in postconviction proceeding to determine whether trial court had improperly instructed jury to consider statutory mitigating circumstance as aggravating circumstance in murder prosecution was not error, and (2) trial court was not required to hold additional hearings in postconviction proceeding to determine whether entire record in murder case contained errors after determining that there was typographical error in trial court's instruction to jury on aggravating circumstances.

Affirmed.

Shaw, J., dissented with opinion in which Barkett and Kogan, JJ., concurred.

Barkett, J., dissented with opinion in which Kogan, J., concurred.

1. **Criminal Law** ⇐998(18)

Holding evidentiary hearing in postconviction proceeding to determine whether trial court had improperly instructed jury to consider statutory mitigating circumstance as aggravating circumstance in murder prosecution was not error. West's F.S.A. RCrP Rule 3.850.

2. **Criminal Law** ⇐998(19)

Trial court was not required to hold additional hearings in postconviction proceeding to determine whether entire record in murder case contained errors after determining that there was typographical error in trial court's instruction to jury on aggravating circumstances. West's F.S.A. RCrP Rule 3.850.

3. **Criminal Law** ⇐998(3)

Claim that executing adult with diminished mental capacity was cruel and unusual punishment could have been raised on direct appeal in murder prosecution and was procedurally barred from postconviction consideration. West's F.S.A. RCrP Rule 3.850; U.S.C.A. Const.Amend. 8.

4. **Criminal Law** ⇐998(13)

Any error arising when trial court refused to grant continuance in murder prosecution to permit trial counsel to conduct penalty phase investigation was not of sufficient magnitude to overcome procedural bar arising in postconviction proceeding when claim was considered on direct appeal; testimony that defense counsel allegedly would have presented was cumulative to that presented at trial. West's F.S.A. RCrP Rule 3.850.

5. **Criminal Law** ⇐998(3)

Claims raised in motion to amend postconviction motion filed in murder case, including claims regarding victim's relationship to prosecution and prosecutor's supposed comments on defendant's failure to produce evidence, could have been raised on direct appeal and were procedurally barred. West's F.S.A. RCrP Rules 3.850, 3.851.

Larry Helm Spalding, Capital Collateral Representative, Mark Evan Olive, Chief Asst. and Jane G. Rocamora, Staff Atty., Office of the Capital Collateral Representative, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen., and John M. Koenig, Jr. and Edward C. Hill, Jr., Asst. Attys. Gen., Tallahassee, for appellee.

PER CURIAM.

Ronald Woods, a prisoner for whom a death warrant has been signed, appeals the trial court's denial of his motion for postconviction relief. We have jurisdiction pursuant to article V, section 3(b)(1) of the state constitution and Florida Rule of Criminal Procedure 3.850. We affirm the trial court's order and lift the stay of execution.

While imprisoned at Union Correctional Institution, Woods and another inmate, Leonard Bean, stabbed four guards, one of whom died. In a joint trial the jury convicted Woods of first-degree murder, three counts of attempted first-degree murder, and possession of contraband, but convicted Bean of only one count of attempted first-degree murder as well as first-degree murder and possession. The trial court agreed with the jury's recommendations and sentenced Bean to life imprisonment and Woods to death. We affirmed Woods' convictions and sentences on appeal. *Woods v. State*, 490 So.2d 24 (Fla.), *cert. denied*, 479 U.S. 954, 107 S.Ct. 446, 93 L.Ed.2d 394 (1986).

In early October Governor Martinez signed Woods' death warrant, effective from December 9 through 16, 1987, with execution scheduled for December 10, 1987. The Office of the Capital Collateral Representative (CCR) then filed a 3.850 motion with the trial court. This motion alleged four grounds for relief: 1) execution of an eighteen-year-old offender with the mental age of twelve is cruel and unusual punishment; 2) the trial court's failure to grant a continuance rendered counsel unable to prepare for sentencing and deprived Woods of a competent mental examination and, alternatively, counsel provided ineffective assistance by not discovering and presenting more mitigating evidence; 3) a pervasively prejudicial atmosphere violated Woods' right to a fair and impartial trial; and 4) the trial court improperly instructed the jury that it could consider Woods' mental problems in aggravation. After a hearing on this motion, the trial court found the first three issues procedurally barred and granted the state's motion for summary dismissal of those points. The court then scheduled an evidentiary hearing on the fourth issue for December 1, 1987.

At that hearing the court reporter responsible for Woods' trial testified and played a tape recording of the trial judge, R.A. Green,[1] reading the instructions to the jury. The recording demonstrates that the first aggravating circumstance given as to Woods was that he was under sentence of imprisonment, not that his mental state could be considered in aggravation as reflected in the record filed here. After the hearing, the trial court held that the "tape speaks for itself, and it clearly and unequivocally shows the proper Jury instruction was given by the Trial Judge to the Jury"[2] and denied the motion for postconviction relief.

At the December 1 hearing CCR presented an "amended emergency" motion for postconviction relief raising five new issues. These issues were: 1) the prosecutor improperly raised, and the court improperly considered, the victim's personal and professional relationship with the prosecution and the court in violation of *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987); 2) the prosecutor improperly commented on Woods' failure to present any evidence in his defense and, alternatively, counsel's failure to object constituted ineffective assistance; 3) the court improperly relied on juvenile offenses and prison disciplinary reports to aggravate the sentence; 4) the prosecutor and court violated *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), by diminishing the jury's role in sentencing; and 5) Woods' trial counsel, Vipperman, should have argued that Bean's counsel, Replogle, had a conflict of

1. Judge Green is now retired. Both the court reporter and Wood's trial counsel identified the voice on the tape as being Judge Green's.

2. Thus, the record filed with this Court, which supports CCR's claim, was refuted.

interest in a joint trial because Replogle originally represented both Bean and Woods. CCR argued that the court could not apply the thirty-day limitation on filing motions for postconviction relief after a death warrant has been signed with execution set for at least sixty days in the future. Fla.R.Crim.P. 3.851. The state, on the other hand, argued that these issues could have been presented in the original motion and urged the court to hold them procedurally barred. The court reviewed the claims and, noting that its November 23 order denied CCR's request to amend the original motion, held:

> These claims are based on information contained in the record. The same record the Petitioner reviewed and cited when it filed its original Motion. In both their original Motion, as well as the Amended Motion, the same transcript is cited, only different pages. Since the Amended Motion does not relate to the grounds raised in the original Motion, and since this Court finds no reason these claims could not have been raised within the time limits provided by the rules, the same is hereby DENIED. To permit the Petitioner to use this procedure of filing new Motions and calling them Amended Motions would create a situation that there never would be finality. This type of activity is the very reason the Rule [3.851] was created.

At the December 1 hearing CCR also filed another amended motion for postconviction relief. According to that motion, allowing the state to demonstrate at an evidentiary hearing that the transcript was in error regarding the instruction CCR complained about rendered the entire record unreliable. The court found nothing in the motion to demonstrate the transcript's incompleteness or inaccuracy. The court held that the "transcript appears to now accurately reflect what occurred during the trial" and that the record did not deny Woods any due process.[3]

3. The court noted that it limited CCR's questioning of the court reporter only because CCR [illegible]

I. Original Motion

A. Error in Transcript

[1] We agree with the trial court's resolution of this issue. The purpose of a 3.850 motion is to provide for inquiry into the alleged constitutional infirmity of a judgment or sentence. *McCrae v. State*, 437 So.2d 1388 (Fla.1983). Postconviction proceedings cannot be used as a substitute for an appeal, and, because they should be raised on appeal, claims regarding jury instructions are, in general, not cognizable in 3.850 proceedings. *Raulerson v. State*, 420 So.2d 567 (Fla.1982), *cert. denied*, 463 U.S. 1229, 103 S.Ct. 3572, 77 L.Ed.2d 1412 (1983); *Merrill v. State*, 364 So.2d 42 (Fla. 1st DCA 1978), *cert. denied*, 372 So.2d 470 (Fla.1979). Here, however, CCR claimed that the trial court instructed the jury to consider a statutory mitigating circumstance as an aggravating circumstance, thereby violating the eighth amendment. We find, contrary to CCR's contention, no error in the court's holding an evidentiary hearing on this claim.

The test for granting a postconviction motion is whether or not the defendant received a fair trial. Whether the trial court erred in the instructions could only be determined through an evidentiary hearing. The testimony and evidence given at the hearing clearly demonstrate that the trial court correctly instructed the jury and that there is no merit to the claim.

[2] If CCR's purpose in making the misinstruction claim was to ascertain the truth about how the court instructed the jury, that purpose has been accomplished. We do not find, however, that this clarification of the record has impaired the credibility of the record as a whole. Nor do we find that the court erred in limiting the hearing to the claim made in the 3.850 motion. If CCR could have pointed out other specific errors in the transcript which, if truly errors, prejudiced Woods, inquiry into those areas would have been appropriate. The finding of one typographical error, however, does not authorize[d] [illegible]

asked him only purely speculative type questions.

rize an undirected fishing expedition on undeveloped assertions when errors in the transcript could have been and should have been brought up on appeal. To hold as CCR urges—that the entire record is inaccurate—is unwarranted.

B. Other Issues

The trial court correctly found the other issues in the original motion to be procedurally barred.

1. Mental Capacity and Prejudice

[3] The claim that executing an adult with diminished mental capacity is cruel and unusual punishment could have been and should have been raised, if at all, on direct appeal. Therefore, it is procedurally barred from postconviction consideration.

This Court considered the prejudice claim on direct appeal. That CCR has now thought of different grounds for raising the same issue is insufficient to overcome the procedural bar. *See Christopher v. State*, 489 So.2d 22 (Fla.1986).

2. Continuance

[4] This Court also considered the trial court's refusal to grant a continuance on direct appeal. CCR now claims that not granting the continuance precluded trial counsel from conducting a reasonable penalty phase investigation and/or counsel unreasonably failed to discover and present mitigating evidence. CCR supplied Woods' school and medical records to two psychologists, one who testified at Woods' trial and one who is new to Woods' case, both of whom wrote reports back to CCR. According to CCR, a continuance and reasonable assistance by counsel would have resulted in more and better testimony regarding Woods and might have caused the jury to recommend life imprisonment rather than a death sentence. The grounds asserted do not overcome the procedural bar.

Woods' mother and a psychologist testified at Woods' sentencing as to his then-current status and his lifelong history of mental, emotional, and behavioral problems. According to his mother, Woods had seizures and convulsions from the time of his birth, which resulted in his being put on medication and his admission to a mental health center hospital when he was eight years old. His mother also testified that she supported her nine children through aid to dependent children and welfare assistance; that Woods' father left the family when Woods was four or five; that Woods later lived with his father, but was so mistreated that he ran away; that Woods was a follower, rather than a leader; and that Woods attended classes for retarded children rather than regular school classes.

The psychologist outlined Woods' home life, including the physical abuse by his father, and concluded that Woods had been emotionally deprived. He also testified about Woods' illnesses, including his hospitalizations, and opined that Woods had an organic brain disfunction. He stated that he had not seen the actual records, but that he had received reports that Woods had been hospitalized for up to six months as a child. The psychologist also testified that Woods' IQ was 69, that his judgment was impaired, and that Woods was not a leader.

Because this psychologist knew that Woods' medical records existed, presumably, trial counsel also knew of their existence. Because the records have now been presented for expert consideration, presumably, they could have been reviewed at the time of Woods' trial if the psychologist had thought them important enough. The jury, however, heard about Woods' problems, and the testimony now advanced, while possibly more detailed than that presented at sentencing, is, essentially, just cumulative to the prior testimony. More is not necessarily better.

As stated before, this Court considered on direct appeal the trial court's refusal to grant a continuance. CCR has not demonstrated error of the magnitude necessary to overcome the procedural bar of a previously considered claim. Moreover, couching a barred claim in terms of ineffective assistance of counsel will not revive such a claim. *See Strect v. State*, 469 So.2d 119 (Fla.1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3308, 92 L.Ed.2d 721 (1986). We hold, therefore, that the trial court did not err in

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II. Amended Motion

[5] In its November 23 order the court denied CCR's request to be allowed to amend the original 3.850 motion at a later date, finding any amendment to be barred by the thirty-day limitation in rule 3.851. As the court decided, that rule was implemented to further some degree of finality in postconviction proceedings and to bring more order to such proceedings. *See In re Rules of Criminal Procedure, Rule 3.851*, 503 So.2d 320 (Fla.1987). We do not encourage piecemeal litigation. On first death warrants when a 3.850 motion has never been filed, however, some leeway can be given, and we encourage trial courts to utilize their discretion and do so.

We recognize the trial court's exasperation at being presented with additional claims which could have been identified at the same time as the original 3.850 claims. An evidentiary hearing on CCR's diligence is not needed, however.[4] Moreover, the additional claims suffer from a procedural bar other than rule 3.851. In *Booth v. Maryland* the United States Supreme Court held that a jury cannot consider a victim impact statement in making its sentencing decision. Raising *Booth* in regards to considering the victim's relationship to the prosecution and the trial court is a misapplication of that case to a claim which should have and could have been raised on appeal. The prosecutor's supposed comments on Woods' failure to produce evidence also should have been raised on appeal. Presenting that claim under the alternate guise of ineffective assistance of counsel is unavailing. *See Sireci*. Likewise, the court's reliance on certain materials in sentencing could and should have been raised on appeal. *Caldwell* is not such a change in the law as to give relief in postconviction proceedings. *Foster v. State*, 518 So.2d 901 (Fla.1987). Therefore, the claim regarding the jury's role in sentencing should have been raised, if at all, on appeal. Finally, the issue regarding Woods' former counsel, Replogle, and severance could have been raised on appeal. Calling Woods' counsel "unreasonable" in regards to this issue does not mean that this claim should be listened to at this, the wrong time. All of the amended motion's claims could have been developed, if they had merit, on appeal. They are not based on new facts or theories. CCR has presented no legal excuse which will overcome the procedural bar.

We find no error in the trial court's rulings and affirm the denial of postconviction relief. The previously entered stay is dissolved.

It is so ordered.

EHRLICH, C.J., and OVERTON, McDONALD and GRIMES, JJ., concur.

SHAW, J., dissents with an opinion, in which BARKETT and KOGAN, JJ., concur.

BARKETT, J., dissents with an opinion, in which KOGAN, J., concurs.

SHAW, Justice, dissenting.

Justice Barkett correctly points out in her dissent that despite a chronological age of eighteen at the time the crime was committed, the appellant possessed an IQ of between 60 to 69 and the mental age of a twelve-year-old. The execution of such a person in my opinion violates article I, section 17 of the Florida Constitution. For this reason I am compelled to dissent from the majority opinion.

BARKETT and KOGAN, JJ., concur.

BARKETT, Justice, dissenting.

This appellant was eighteen years of age at the time the crime was committed, and his mental age was twelve. There is little question that he is mentally retarded, with an IQ of between 60 and 69. *See* Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo.Wash.L.Rev. 414, 423 (1985) (persons with IQs between approxi-

4. There is no question of CCR's effectiveness in this case. *See Troedel v. State*, 479 So.2d 736 (Fla.1985).

mately 55 and 70 "have a substantial disability"). His age alone constitutes a significant mitigating factor under the death penalty statute. § 921.141(6)(g), Fla.Stat. (1985). While the United States Supreme Court has not directly addressed the issue, I conclude that imposing the death penalty on a mentally retarded person constitutes cruel and unusual punishment under both the federal constitution and article I, section 17 of the Florida Constitution.

At the very least, I believe this appellant is entitled to an evidentiary hearing on his claim of ineffective assistance of trial counsel. If counsel had conducted a reasonable investigation, he would have discovered a documented history of psychosis dating back to age eight. Particularly important are hospital records reflecting that at age eight, appellant was placed in a psychiatric hospital for treatment of a cerebral dysfunction. During this episode, appellant was physically restrained and treated with psychotropic drugs commonly prescribed for the treatment of psychosis.

Appellant submits that Dr. Harry Krop, appellant's expert, would have established the existence of statutory mitigating factors had he only known the information contained in these medical records. Specifically, Krop would have testified that appellant acted under duress, was emotionally disturbed, was substantially dominated by others, and suffered from a substantially impaired ability to conform his behavior to the requirements of law. Counsel's failure to apprise this expert of appellant's background constitutes prejudicially ineffective assistance of counsel, which was not cured by introduction of general evidence about appellant's troubled emotional history as described solely by his family.

Moreover, I believe the majority fails to analyze appellant's claim of ineffective assistance of counsel under the applicable law. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). The sweeping statement that "couching a barred claim in terms of ineffective assistance of counsel will not revive such a claim," majority opinion, at 83, is at best unclear and at worst a rule that would vitiate virtually any claim of ineffectiveness of counsel. Ineffective assistance necessarily concerns matters counsel failed to raise below, which by definition thus are procedurally barred. The issue in any claim of ineffectiveness is not the procedural bar, but whether counsel's deficiency, if any, led to a "reasonable probability that ... the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. The facile standard applied by the majority could result in every claim of ineffectiveness being summarily dismissed as a subterfuge for raising barred claims.

Finally, I believe the trial judge erred in failing to let this appellant add several new claims to his request for relief. Nine days were left before the scheduled execution, and two weeks remained during which the warrant would be active. The trial court summarily denied appellant a hearing as to whether his counsel had performed with due diligence. Because a man's life is at stake, I conclude that it was fundamentally unfair not to afford appellant the requested hearing. The death penalty must be applied "fairly, and with reasonable consistency, or not at all." *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 875, 71 L.Ed.2d 1 (1982). This principle means that a court *must* consider any point raised by a condemned prisoner as a reason why the death penalty should not be imposed.

KOGAN, J., concurs.



Donald and Michele PIERCE, Petitioners,

v.

AALL INSURANCE INCORPORATED, Respondent.

No. 71381.

Supreme Court of Florida.

July 14, 1988.

Rehearing Denied Sept. 19, 1988.

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